82-411

No. ———

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ANDREW M. KRAMER
Counsel of Record
DEBORAH CRANDALL
RONALD LINDSAY
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400
Attorneys for Petitioner

Dated: September 10, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Does an employer which provides health insurance benefits for employees and their dependents discriminate against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing only limited coverage for pregnancy-related expenses incurred by male employees' wives? *

PARTIES

Petitioner, Newport News Shipbuilding and Dry Dock Company, and Respondent, the Equal Employment Opportunity Commission, were the only parties to the proceedings before the United States Court of Appeals for the Fourth Circuit.** Newport News Shipbuilding and Dry Dock Company, a corporation, is a wholly-owned subsidiary of Tenneco Corporation, which is a subsidiary of Tenneco, Inc.

---

* Subsidiary questions are:

(1) In enacting the Pregnancy Discrimination Act, did Congress overturn the rationale, as well as the holding, of this Court's decision in General Electric Co. v. Gilbert?

(2) In enacting the Pregnancy Discrimination Act, did Congress make it unlawful under Title VII for an employer to make *any* distinctions based on pregnancy, childbirth, or related medical conditions even if such distinctions are not prohibited by the sex discrimination bans found in Sections 703(a) and 704 of Title VII?

** The Chamber of Commerce of the United States and the Equal Employment Advisory Council also participated in the Fourth Circuit proceedings as *Amici Curiae* urging affirmance of the decision of the district court. The United Steelworkers of America, AFL-CIO-CLC, and John McNulty, both of whom were Defendants in Civil Action No. 80-20-NN, one of the two cases consolidated before the Fourth Circuit, did not participate in the Fourth Circuit proceedings.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	13
I. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE ONLY OTHER CIRCUIT COURT DECISION ADDRESSING THE QUESTION PRESENTED FOR REVIEW	13
II. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *GENERAL ELECTRIC CO* v. *GILBERT*	15
III. THE COURT BELOW INCORRECTLY DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	16
CONCLUSION	27
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	9a
APPENDIX D	20a
APPENDIX E	21a
APPENDIX F	22a
APPENDIX G	23a
APPENDIX H	24a
APPENDIX I	50a

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 18

Dothard v. Rawlinson, 433 U.S. 321 (1977) 18

EEOC v. Emerson Electric Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 14, 15

EEOC v. Joslyn Manufacturing & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) 14, 15

EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for rehearing filed*, No. 81-4542 (July 27, 1982) 13, 14, 15, 21, 23, 24, 26

EEOC v. Lockheed Missiles & Space Co., 27 Fair Empl. Prac. Cases 1209 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1243 (9th Cir.), *petition for rehearing filed*, No. 81-4542 (July 27, 1982) 14

Geduldig v. Aiello, 417 U.S. 484 (1974) 18

General Electric Co. v. Gilbert, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977) .....*passim*

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 18

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 16, 17

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) ..16, 17, 18

United Teachers—Los Angeles v. Board of Education, 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal.), *appeal docketed*, No. 82-5360 (9th Cir. March 12, 1982) 14

Statutes:

U.S. Const. amend. XIV 18

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* .....*passim*

Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1978) 8

5 U.S.C. §§ 701-06 10

28 U.S.C. § 451 10

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1331	10
28 U.S.C. § 1343	10
28 U.S.C. § 1345	10
28 U.S.C. §§ 2201-02	10
Legislative Materials:	
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (Mar. 13, 1978)	20
Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* (Comm. Print 1980)	19, 20, 21, 22, 24, 25
S. Rep. No. 95-331, 95th Cong., 1st Sess. (July 6, 1977)	20, 21, 24
123 Cong. Rec. S4,142-43 (1977) (remarks of Sen. Williams)	19
123 Cong. Rec. S14,989 (1977) (remarks of Sen. Williams)	20
123 Cong. Rec. S14,991 (1977) (remarks of Sen. Javits)	22
123 Cong. Rec. S15,038-39 (1977) (remarks of Sen. Williams and Sen. Hatch)	25
123 Cong. Rec. E1,487 (1977) (remarks of Rep. Hawkins)	19
123 Cong. Rec. E2,095 (1977) (remarks of Rep. Hawkins)	20
124 Cong. Rec. S18,978 (1978) (remarks of Sen. Javits)	20
124 Cong. Rec. E6,863 (1978) (remarks of Rep. Hawkins)	20
Administrative Materials:	
29 C.F.R. § 1604.10(b) (1975)	5
29 C.F.R. § 1604.10(b) (1981)	4
29 C.F.R. Part 1604 (Appendix) (1981)	6, 9
39 *Fed. Reg.* 6,836 (April 6, 1972)	5
44 *Fed. Reg.* 23,804 (April 20, 1979)	26
44 *Fed. Reg.* 23,805 (April 20, 1979)	5
44 *Fed. Reg.* 23,807-08 (April 20, 1979)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ———

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Newport News Shipbuilding and Dry Dock Company [hereinafter, "the Shipyard"], an employer subject to the provisions of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, respectfully prays that a writ of certiorari issue to review an *en banc* decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's final opinion, which is a one paragraph *per curiam* opinion issued after rehearing *en banc*,

is unreported and is reproduced herein as Appendix A. The Fourth Circuit's *per curiam* opinion adopted the rationale set forth in the panel opinion, which is reported at 667 F.2d 448 and is reproduced herein as Appendix B. The amended opinion and order of the district court in Civil Action No. 80-20-NN is reported at 510 F. Supp. 66 and is reproduced herein as Appendix C.[1] The district court's final order in Civil Action No. 80-237-NN, which is unreported, is reproduced herein as Appendix E.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The final judgments of the Fourth Circuit, which are reproduced herein as Appendix F and Appendix G, were entered on June 22, 1982. This Petition was filed within ninety days of that date.

STATUTES AND REGULATIONS INVOLVED

Section 701(k) of Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated

[1] The district court's initial opinion and order in Civil Action No. 80-20-NN, entered on January 26, 1981, and reported at 24 Fair Empl. Prac. Cases 1363, enjoined the Equal Employment Opportunity Commission ("EEOC") from processing charges of discrimination concerning the Shipyard's health insurance plan and enjoined the United Steelworkers of America, AFL-CIO-CLC [hereinafter, "the Steelworkers"], from processing grievances relating thereto. On timely motions to amend filed by the EEOC and the Steelworkers, the district court struck the injunction against the Steelworkers and limited the injunction against the EEOC to permit it to process charges. The amended opinion and order is identical to the initial opinion and order in all other respects. Accordingly, the district court's initial opinion and order, and its initial judgment, are omitted from the Appendix. The district court's amended judgment is reproduced herein as Appendix D.

the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e-(k).

Section 703(a) of Title VII:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 704 of Title VII:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or

retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to the classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

42 U.S.C. § 2000e-3.

Subsection 10(b) of the EEOC's Guidelines on Discrimination Because of Sex:

Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance

or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

44 *Fed. Reg.* 23,805 (April 20, 1979), *reprinted in* 29 C.F.R. § 1604.10(b) (1981).[2]

Questions and Answers Nos. 21 and 22:

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-

---

[2] At the time of this Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977), this subsection of the Guidelines read as follows:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

39 *Fed. Reg.* 6,836 (April 5, 1972), *reprinted in* 29 C.F.R. § 1604.10(b)(1975).

related conditions of the spouses of male employees? Of all the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

44 *Fed. Reg.* 23,807-08 (April 20, 1979), *reprinted in* 29 C.F.R. Part 1604 (Appendix) (1981).

STATEMENT OF THE CASE

The Shipyard, as a self-insurer, provides a Hospitalization, Medical-Surgical, and Major Medical Plan [herein-

after, "the Plan"] for "all active, full-time, production, maintenance, technical and clerical areas' bargaining unit eligible employees" who have been on the payroll for three continuous months.[3] The Plan, established in 1951, covers eligible employees of both sexes, their spouses, and their unmarried children who are between the ages of 14 days and 19 years.[4] After exhaustion of a $100 per person deductible, the Major Medical component of the Plan provides reimbursement for 80% of the reasonable and customary charges for all covered medical expenses per calendar year, up to a lifetime maximum of $25,000 per person.[5] With specific exclusions and limitations, the Medical-Surgical component of the Plan provides reimbursement for 100% of the reasonable and customary charges for all surgical procedures and the Hospitalization component provides full reimbursement for the cost of a semi-private hospital room, intensive care, or coronary care unit for up to 120 days, and for the reasonable and customary charges for hospital services (including general nursing care, x-ray examinations, and drugs) and other necessary services while hospitalized, up to 100% of the first $750, then 80% of the excess up to 120 days.[6]

---

[3] The full text of a booklet describing the principal features of the Plan is reproduced herein as Appendix H.

[4] *See* Appendix at 29a. Coverage is extended to unmarried children over the age of 19 years under certain limited circumstances. *See* Appendix at 30a.

[5] *See* Appendix at 32a-34a.

[6] The Plan provides limited coverage for, *inter alia*, oral surgery, injuries and illnesses treated in a hospital emergency room, mental care when the patient is not hospitalized, and dependents' maternity benefits. *See* Appendix at 37a-39a. By virtue of its "Coordination of Benefits" provisions, the Plan also limits reimbursements for expenses covered by Medicare and limits dependent coverage by providing that expenses incurred by a spouse employed elsewhere are to be paid first by the spouse's group plan, if any. *See* Appendix at 34a-36a, 47a-48a. The Plan totally excludes coverage for, *inter alia*, charges by a psychologist not recommended by and under the

With respect to the maternity benefits available to female employees and the spouses of male employees alike, the Hospitalization component of the Plan historically provided reimbursement for up to 100% of the reasonable and customary charges for delivery and anesthesiologists, and up to $500 of all other hospital charges. After enactment of the Pregnancy Discrimination Act ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1978), the Shipyard amended the Hospitalization component of its Plan to provide that, "Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement . . . ."[7] The $500 limitation still applies to the pregnancy-related hospitalization costs incurred by the wives of male employees.[8]

---

direction of a psychiatrist, charges covered by Workers' Compensation, charges incurred as a result of an act of violence or riot if the person seeking reimbursement is determined to be the aggressor, charges for well baby care (routine charges made by the hospital and doctor for the care of a normal, healthy newborn), charges for non-prescription drugs and medicines, charges for certain pre-existing conditions, charges for eyeglasses, charges for unnecessary cosmetic surgery, charges for routine physical examinations, and charges for preventative innoculations. *See* Appendix at 31a, 42a-44a.

[7] The PDA became effective on October 31, 1978. It required all fringe benefit programs in effect as of October 31, 1978 to be amended by April 29, 1979. For a period of one year from October 31, 1978, the PDA prohibited any employer which had a fringe benefit plan in effect on October 31, 1978 from reducing benefits or compensation in order to come into compliance with its terms. The full text of the PDA is reproduced herein as Appendix I.

[8] The booklet describing the principal features of the Plan describes the Plan's maternity benefits hospitalization provision as follows:

28. What maternity benefits are provided?

A. The Basic Plan pays up to $500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges.

B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital

All reasonable and customary pregnancy-related surgical costs, as well as the medical expenses incurred as a result of most complications arising from the pregnancy of a male employee's spouse, are covered by the Medical-Surgical and Major Medical components of the Plan.

On September 20, 1979, John McNulty, a Shipyard employee covered by the Plan, filed a charge with the EEOC, claiming that the Shipyard's Plan unlawfully discriminated against him because of his sex in that it limited to $500 the hospitalization coverage available for his wife's pregnancy. On October 28, 1979, the Steelworkers filed a similar charge against the Shipyard on behalf of other individuals.[9] The allegations of these charges found support in the EEOC's Guidelines on Discrimination Because of Sex [hereinafter, "EEOC Guidelines"] as set forth at 29 C.F.R. Part 1604 (Appendix) in Questions and Answers Nos. 21 and 22.

In response to these charges, and to the EEOC's position with respect to them, the Shipyard filed a complaint in district court seeking a declaratory judgment that Questions and Anwers Nos. 21 and 22 of the EEOC Guidelines were *ultra vires* the statute, as well as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. The Shipyard's complaint also sought an order permanently enjoining the EEOC from enforcing these Guidelines and an order requiring the EEOC to publish a

---

confinement as described in Question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

C. Maternity benefits for the wife of a male employee will continue to be paid as described in part "A" of this question.

Appendix at 37a.

[9] The Steelworkers, a labor organization, is the collective bargaining representative of the Shipyard's production and maintenance employees.

notice in the *Federal Register* declaring that Guidelines Nos. 21 and 22 are null and void.[10]

On December 15, 1980, the EEOC filed a complaint against the Shipyard in the same court.[11] The EEOC's complaint alleged that the Shipyard violated Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), in that it did not reimburse male employees for expenses related to their wives' pregnancies to the same extent that it reimbursed female employees for expenses related to their husbands' disabilities. The EEOC's complaint sought an order enjoining the Shipyard from engaging in any employment practices which discriminate because of sex, an order requiring the Shipyard to provide equal compensation to its male employees in the future, monetary relief for those allegedly discriminated against by operation of the Plan, and other affirmative relief designed to eradicate the effects of the alleged discrimination.

In granting the Shipyard's motion for summary judgment in the first case, the district court held that the Shipyard's Plan was not discriminatory on its face and that, there was no showing that the Plan, by limiting reimbursements for the pregnancy-related expenses of spouses of male employees, has caused any gender-based effect in violation of Section 703(a)(1) of Title VII, 42

---

[10] Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. §§ 2201-02 (Declaratory Judgment), and 5 U.S.C. §§ 701-06 (Administrative Procedure Act). The Defendants in this action were the EEOC, the Steelworkers, and McNulty. The latter two Defendants were included pursuant to Rule 19(a)(2) of the Federal Rules of Civil Procedure. The district court found that it had jurisdiction of this matter pursuant to 28 U.S.C. §§ 2201-02. 510 F. Supp. at 71 (Appendix at 17a).

[11] The EEOC invoked the district court's jurisdiction pursuant to 28 U.S.C. § 451, 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 1345 (United States as plaintiff), as well as 42 U.S.C. § 2000e-5 (f)(1) and (3) (Title VII).

U.S.C. § 2000e-2(a)(1). 510 F. Supp. at 71 (Appendix at 16a-17a). It also declared that Questions and Answers Nos. 21 and 22 of the EEOC Guidelines are contrary to law and are of no force and effect and that McNulty is entitled to no benefits under Title VII which were not already provided to him under the Plan. *Id.* In so holding, the district court noted that the PDA changed the law only with respect to *female* employees and applicants for employment and that the legislative history of the PDA states explicitly that the issue of dependents' benefits would have to be resolved using "the existing principles of Title VII." 510 F. Supp. at 70 (Appendix at 15a-16a). According to the district court, "the existing principles of Title VII" with respect to McNulty's claim, and all others involving neither female employees nor applicants for employment, are set forth in this Court's decision in *General Electric Co. v. Gilbert.* 510 F. Supp. at 71 (Appendix at 16a). For the reasons stated in its decision in the declaratory judgment case, the district court subsequently granted the Shipyard's motion to dismiss the EEOC's complaint in the Title VII case for failure to state a claim upon which relief could be granted. Appendix at 21a.

A panel of the Fourth Circuit, having consolidated the two cases, reversed the district court's decisions. In an opinion authored by Senior Circuit Judge Haynsworth, the panel majority found that the language of the PDA, as well as the legislative history of that Act, supported the EEOC's position that the Shipyard's Plan, on its face, unlawfully discriminated against male employees. 667 F.2d at 450-51 (Appendix at 4a-7a). It also concluded that even if Congress intended to leave this question open, this Court's decision in *Gilbert* did not apply because the PDA overturned the rationale of that decision as well as its holding. 667 F.2d at 451 (Appendix at 7a). The panel's conclusion is as follows:

> We cannot read the [PDA] . . . so narrowly as to overturn the specific holding in *Gilbert* without affecting the reasoning upon which that holding was based. The language of the new statute strongly indicates a purpose to equate pregnancy, childbirth and related medical conditions with sex. Distinctions based on pregnancy, the Congress said, are distinctions based on sex.
>
> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

Id.

Circuit Judge Hall dissented from the majority opinion of the panel. In his opinion:

> Regardless of one's personal feelings on the matter, pregnancy-based classifications are lawful except to the extent that *General Electric v. Gilbert* . . . has been limited by the Act. Had Congress intended to completely eviscerate *Gilbert*, it could have easily done so without references to a woman's ability or inability to work.

667 F.2d at 452 (Hall, C.J., dissenting) (citation omitted) (Appendix at 8a).

After granting the Shipyard's motion for rehearing *en banc*, a majority of the Fourth Circuit—Judges Butzner, Phillips, Murnaghan, Sprouse, and Ervin—agreed with Judge Haynsworth's opinion. Appendix at 1a. Judges Widener, Hall, and Chapman dissented for the reasons set forth in Judge Hall's dissent to the panel opinion. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE ONLY OTHER CIRCUIT COURT DECISION ADDRESSING THE QUESTION PRESENTED FOR REVIEW.

In concluding that the Shipyard's Plan unlawfully discriminates against male employees in violation of Title VII because it provides only limited benefits for the pregnancy-related hospital costs of the wives of male employees, the court below found that Congress intended the PDA to make it unlawful for an employer to make any distinctions based on pregnancy or related medical conditions, even if the person suffering from such a condition is not an employee. It also held that although Congress may have intended the question of coverage of dependents' pregnancy-related benefits to be controlled not by the PDA, but by basic principles of Title VII, this Court's decision in *Gilbert* was not such a "principle" since it had been overturned by enactment of the PDA. The court below based these conclusions on the language of the PDA and a review of the legislative history of that Act.

Two weeks after the court below issued its *en banc* decision, the Ninth Circuit isued a decision in *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir.), *petition for rehearing filed*, No. 81-4542 (July 27, 1982), holding that an employer's health insurance plan which covers dependents, but which totally excludes coverage for the pregnancy-related expenses of the wives of male employees, does *not* discriminate against male employees in violation of Title VII, as amended by the PDA. The Ninth Circuit held that Congress intended the PDA to do "no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees" and that the question of coverage of dependents' pregnancy-rated benefits is controlled by Title VII's basic principles, including those set forth in *Gilbert*. 680

F.2d at 1246.[12] This conclusion, like the conclusion of the court below, is based on an analysis of the language of the PDA and a review of its legislative history.

The existence of these conflicting decisions raises substantial questions about the continued validity of this Court's *Gilbert* decision and about the requirements of Title VII, as amended by the PDA.[13] As the law now stands, health insurance plans such as the Shipyard's Plan are lawful in the Ninth Circuit, but unlawful in the Fourth Circuit. The purpose of a federal law is to establish uniform federal standards; uniformity is particularly important with respect to Title VII because it impacts on employees of both large and small employers nationwide.[14] Because of the conflicting decisions on the

---

[12] Judge Wright, specially concurring in *Lockheed*, concluded that that question was resolved neither by *Gilbert* nor by the PDA, but that Lockheed's health insurance plan must be upheld under other principles of Title VII. 680 F.2d at 1247 (Wright, J., specially concurring).

[13] The decision of the court below also conflicts directly with the decisions of all but one of the district courts which have confronted this issue. *See* EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982); EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982). *See also* EEOC v. Lockheed Missiles & Space Co., 27 Fair Empl. Prac. Cases 1209 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1243 (9th Cir.), *petition for rehearing filed*, No. 81-4542 (July 27, 1982); Newport News Shipbuilding and Dry Dock Co. v. EEOC, 510 F. Supp. 66 (E.D. Va. 1981), *rev'd*, 667 F.2d 448 (4th Cir.), *aff'd on rehearing en banc per curiam*, —— F.2d —— (1982) (this case). Counsel for Petitioner are aware of only one district court decision which reaches the same conclusion as the opinion at issue in this Petition. This decision, United Teachers—Los Angeles v. Bd. of Educ., 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal.), *appeal docketed*, No. 82-5360 (9th Cir. March 12, 1982), has been effectively nullified by the Ninth Circuit's holding in *Lockheed*.

[14] In general, Title VII applies to all persons engaged in an industry affecting commerce who have fifteen or more employees. *See* 42 U.S.C. § 2000e-(b). As is apparent from the case citations in

question presented herein, employers doing business in the geographical areas covered by the Fourth and Ninth Circuits are subject to different directives with respect to their obligations to provide pregnancy-related health insurance benefits for the wives of their male employees. The Shipyard respectfully submits that this Court should grant the instant Petition in order to resolve this conflict and thus to give direction to the Seventh and Eighth Circuits, which now face the precise question presented for review.[15]

II. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *GENERAL ELECTRIC CO. v. GILBERT.*

Gilbert involved the question of an employer's Title VII obligations with respect to providing benefits to employees for pregnancy-related disabilities. Although *Gilbert* did not directly address an employer's Title VII obligations with respect to the provision of disability benefits to employees' dependents, the rationale of *Gilbert* applies to dependents as well as employees—if it was lawful under Title VII, before enactment of the PDA, to exclude benefits for the pregnancy-related disabilities of employees, and if the PDA changed Title VII only with respect to female employees and applicants for employment, it is now lawful, under the rationale of *Gilbert*, to exclude or limit benefits for the pregnancy-related disabilities of employees' dependents. *See Lockheed, supra*, 680 F.2d at 1247; *EEOC v. Joslyn Manufacturing & Supply Co., supra*, 524 F. Supp. at 1143; *EEOC v. Emerson Electric Co., supra*, 539 F. Supp. at 158-59. Therefore, the instant Petition should be granted because the

---

the previous footnote, employers in all parts of the country have health insurance plans with maternity benefits provisions similar to those in the Shipyard's Plan.

[15] *See* EEOC v. Joslyn Mfg. & Supply Co., *supra*; EEOC v. Emerson Elec. Co., *supra*.

opinion of the court below decides a federal question in a way which is directly contrary to this Court's opinion in *Gilbert* and which renders suspect the rationale of that case and other decisions of this Court which have adhered to its rationale.[16]

III. THE COURT BELOW INCORRECTLY DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The opinion of the court below, like this Court's opinion in *Gilbert*, is of obvious importance to employers and employees nationwide.[17] This Court has not yet had occasion to address the impact of the PDA on an employer's Title VII obligations with respect to health insurance plans or on *Gilbert*, itself. The Shipyard submits that the litigants and the lower courts need the prompt assistance of this Court in answering this important question of statutory construction.

The court below found that the language of the PDA is "tortured" if construed to extend benefits only to female employees and applicants for employment. 667 F.2d at 450. According to that court:

> [The] coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected"; it does not say "as other *employees* not so affected."

---

[16] The rationale of *Gilbert* has been relied upon by this Court in analyzing the lawfulness of employee benefit plans in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

[17] *See* n.14, *supra*.

667 F.2d at 450-51 (emphasis in original). Noting that the Senate Committee Report on S. 995, the bill which eventually became the PDA, indicated that the PDA did not address the question of medical coverage for the dependents of employees, the court below acknowledged that the PDA itself might not control this case. 667 F.2d at 451. It nevertheless concluded that the Shipyard violated Title VII because its Plan "contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses" and because the PDA overturned the reasoning of *Gilbert*, as well as its specific holding. At no point did the court below explain why the Shipyard's Plan is unlawful if neither *Gilbert* nor the PDA answers the question presented for review. Nor did it explain whether it found the Plan to violate Section 703(a)(1) or Section 703(a)(2) of Title VII.[18] In fact,

---

[18] This Court has indicated that questions about the lawfulness of employee benefit plans under Title VII should be analyzed under Section 703(a)(1). *See* Nashville Gas Co. v. Satty, *supra*, 434 U.S. at 140-43 (1977). *See also* Los Angeles Dep't of Water & Power v. Manhart, *supra*.

As explained in *Manhart*, an employment practice is facially discriminatory under Section 703(a)(1) if it divides employees into two groups, each of which is "composed entirely and exclusively of members of the same sex." 435 U.S. at 715. For purposes of reimbursements for hospitalization costs incurred by dependents, the Shipyard's Plan divides employees into two groups—male employees with pregnant spouses and all employees with dependents. "While the first group is exclusively . . . [male], the second includes members of both sexes." *Id.*, *quoting from Gilbert*, 429 U.S. at 135, and Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974). Thus, under the Title VII principles enunciated in *Manhart*, the Shipyard's Plan is not discriminatory on its face under Section 703(a)(1).

The court below did not find that the Shipyard's Plan's pregnancy distinctions "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Satty*, 434 U.S. at 145 (*quoting from Gilbert*, 429 U.S. at 135). Moreover, even if the disparate impact theory applies to employee benefit plans (*see Manhart*, 435 U.S. at 711 n.20; *Satty*, 434 U.S. at 144-45),

while conceding that the Senate Committee Report on S. 995 indicates that the PDA does not dictate the result in this case, the court below nevertheles apparently based its conclusion on the PDA alone—"Distinctions based on pregnancy, the Congress said, are distinctions based on sex." 667 F.2d at 451. With due deference to the court below, the Shipyard submits that the PDA does not answer the question presented for review in the manner decided by that court.

As noted earlier, this Court held in *Gilbert* that an employer did not violate Section 703(a)(1) of Title VII by providing its employees with a disability benefits plan which covered both male and female employees, but excluded coverage for employees' pregnancy-related disabilities. In reliance on principles set forth in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court in *Gilbert* reasoned that Title VII, like the Equal Protection Clause, permits an employer's disability benefits plan to exclude certain risks and that, absent proof that a disability benefits plan containing a pregnancy exclusion is a pretext for invidious discrimination against one sex or the other, or in fact provides fewer benefits for female employees than for male employees, no Title VII violation can be found. 429 U.S. at 135-36. The decision in *Gilbert* flatly rejected the contrary provisions of the EEOC's Guidelines, 29 C.F.R. § 1604.10(b)(1975), which then required employers to treat "disability due to pregnancy or childbirth . . . the same as . . . other temporary disabilities." 429 U.S. at 140-46.

---

there is no record evidence to show that the Shipyard's Plan has an actual adverse impact on male employees. In addition, a finding of such impact does not establish a Title VII violation. Such a finding does no more than create a *prima facie* case of a Title VII violation which the employer must be given an opportunity to attempt to rebut. *See, e.g., Satty*, 434 U.S. at 144-46; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The court below gave the Shipyard no such opportunity.

In the eyes of many, including Justice Brennan, the result in *Gilbert* was inconsistent with "the ultimate objective of Title VII, 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [*sexually*] *stratified job environments* to the disadvantage of [women].'" 429 U.S. at 160 (Brennan, J., dissenting) (*quoting from McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)) (brackets in original). Justice Brennan also noted that this result was contrary to "the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden *women workers* and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." 429 U.S. at 158 (Brennan, J., dissenting) (emphasis added).

The PDA was enacted by Congress in 1978 in direct response to concerns such as those articulated by Justice Brennan in his dissenting opinion in *Gilbert*. The PDA emerged from identical bills—S. 995 and H.R. 5055—both of which were expressly designed to ease the pregnancy-related burdens faced by women workers.[19] It added a

---

[19] When introducing S. 995, Senator Harrison A. Williams, Jr., its chief sponsor, as well as the chairman of the Senate Committee on Labor and Human Resources, explained that enactment of his bill was necessary because, "[W]*orking women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. S4,142-43 (1977) (remarks of Sen. Williams), *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* 1, 4 (Comm. Print 1980) [hereinafter, "*Legislative History*"] (emphasis added). In introducing H.R. 5055, Congressman Augustus Hawkins stated that his bill would guarantee the continued impact of progressive laws which have lifted many of the barriers previously faced by "*women entering the labor market.*" 123 Cong. Rec. E1,487 (1977) (remarks of Rep. Hawkins) (*Legislative History* 12) (emphasis added). When he later introduced

new subsection to the definitions section of Title VII (Section 701) to "require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." [20] In pertinent part, this new subsection, Section 701(k), provides as follows:

H.R. 6075, which was identical to H.R. 5055 except that it added language relating to abortions, Congressman Hawkins asserted that, "[E]nactment of this bill is necessary [because] . . . discrimination against pregnant women is one of the chief ways in which *women's careers* have been impeded and *women employees* treated like second-class employees." 123 Cong. Rec. E2,095 (1977) (remarks of Rep. Hawkins) (*Legislative History* 25) (emphasis added).

See also 123 Cong. Rec. S14,989 (1977) (remarks of Sen. Williams) (*Legislative History* 62) ("the overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status with regard to *career advancement and continuity of employment and wages*") (emphasis added); H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (Mar. 13, 1978) (*Legislative History* 148) ("It is the committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act"); 124 Cong. Rec. S18,978 (1978) (remarks of Sen. Javits) (*Legislative History* 203) ("Without [the PDA] . . . *women workers* would face serious obstacles to continuing their pregnancy and maintaining their jobs at the same time") (emphasis added).

[20] S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (July 6, 1977) (*Legislative History* 41) ("The bill [S. 995] would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work"); H. Rep. No. 95-948, *supra* (*Legislative History* 150) ("The bill [H.R. 6075] would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work"). *See also* 124 Cong. Rec. E6,863 (1978) (remarks of Rep. Hawkins) (*Legislative History* 166) ("H.R. 6075 was introduced . . . to clarify congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work").

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e-(k).

According to the court below, the first clause of Section 701(k) makes it unlawful for employers to make *any* distinctions based on pregnancy, childbirth, or related medical conditions, even distinctions which impact only on non-employees. This interpretation ignores the fact that the first clause of Section 701(k) is limited by the second clause of the same sentence. *See Lockheed, supra*, 680 F.2d at 1245 ("The second clause . . . clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms").[21]

The decision of the court below also ignores the fact that the first clause of Section 701(k) is purely definitional—it does not prohibit anything. It says only that discrimination based on pregnancy, etc., is sex discrimination. The addition of this broad definition to Title VII did not increase an employer's Title VII obligations so as to make it *a violation of Title VII* for an employer to make *any* distinctions on the basis of pregnancy, childbirth, or related medical conditions.[22] Title VII proscribes

---

[21] *See also* previous footnote.

[22] The Senate Report expressly stated that S. 995 "defines sex discrimination, *as proscribed in the existing statute*, to include . . . physiological occurrences peculiar to women; *it does not change the application of Title VII to sex discrimination in any other way.*" S. Rep. No. 95-331, *supra*, 3-4 (*Legislative History* 40-41) (emphasis

employer actions only with respect to employees and applicants for employment.

Only two provisions of Title VII—Sections 703(a) and 704—contain prohibitions on employer actions. Section 704, 42 U.S.C. § 2000e-3, is not pertinent to this case.[23] Section 703(a) provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). This Section cannot be read to prohibit an employer from making distinctions between various categories of the *dependents* of its employees in determining what risks will be covered by its health insurance plan.

---

added). *See also* 123 Cong. Rec. S14,991 (1977) (remarks of Sen. Javits) (*Legislative History* 66) ("*This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII . . . into new areas of employment relationships.* Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert*") (emphasis added).

[23] Section 704 prohibits an employer from discriminating against any employee or applicant because he has opposed employment practices which violate Title VII or because he has made a charge,

Nor did the PDA alter in any way an employer's existing Title VII obligations with respect to its male employees. As the Ninth Circuit noted in *Lockheed*, the first clause of Section 701(k), when read together with Section 703(a)(1), prohibits discrimination "against any individual with respect to his compensation . . . because of *such individual's* . . . pregnancy, childbirth or related medical conditions." 680 F.2d at 1245 (emphasis in original). "This can hardly be read to apply to male employees." *Id.* The same conclusion must be reached if Section 701(k) is read together with Section 703(a)(2) —"to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of *such individual's* . . . pregnancy, childbirth, or related medical conditions."

The only *command* of the PDA requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same . . . as other persons not so affected but similar in their ability or inability to work . . . ." This language, found in the second clause of Section 701(k), cannot be read to increase an employer's Title VII obligations with respect to *male employees*.[24] Moreover, as Judge Hall pointed out in his dissent in the decision at issue herein, this language cannot possibly be read to add to Title VII a prohibition against discrimination with respect to the wives of male employees:

> To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an em-

---

testified, assisted, or participated in any manner in a Title VII investigation, proceeding, or hearing, and prescribes neutral advertising relating to employment unless religion, sex, or national origin is a bona fide occupational qualification for employment.

[24] *See also* n.22, *supra*.

> ployee. To hold otherwise is to simply ignore the language of the Act.

667 F.2d at 452 (Hall, J., dissenting). *See also Lockheed, supra*, 680 F.2d at 1245. Thus, the Shipyard submits that the language of the PDA compels a conclusion that the PDA does not address, let alone decide, the question of an employer's obligation under Title VII to provide health insurance benefits for the pregnancy-related expenses of the wives of male employees.

The legislative history fully supports this conclusion. In its report to the Senate on S. 995, the bill which ultimately was passed by both branches of Congress as the PDA, the Senate Commitee on Labor and Human Resources stated:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore *the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.*

S. Rep. No. 95-331, *supra*, 5-6 (*Legislative History* 42-43) (emphasis added). Moreover, in a colloquy with Senator Hatch on the Senate floor, Senator Williams, the principal sponsor of S. 995, assured Congress that his bill did not cover employees' dependents.[25]

---

[25] Mr. HATCH: *The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad,* and is not limited in terms of employment. It does not require that the person so affected be pregnant.

Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amend-

In addition, although it argued before the court below that the PDA itself made it unlawful for an employer to discriminate against the spouses of male employees, the EEOC once recognized that the PDA does not answer the question presented for review. In promulgating the final post-PDA amendments to its Guidelines, the EEOC advised the public as follows:

> The Commission concluded that health insurance benefits for the pregnancy-related conditions of the male employee's spouse must be available to the same extent as health insurance benefits are available to the female employee's spouse. . . .
>
> The Pregnancy Discrimination Act amends Title VII of the Civil Rights Act of 1964, as amended. To

---

ment. One might even argue that other female dependents are covered. And what about the status of a woman coworker who is not pregnant but rides with a pregnant woman and cannot get to work once the pregnant female commences her maternity leave or the employed mother who stays home to nurse her pregnant daughter? Are they women "affected by" pregnancy?

Could the sponsors clarify exactly whom that phrase intends to cover?

* * * *

Mr. WILLIAMS: If there is an ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and *if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.

Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of a female employee.

Mr. WILLIAMS: Exactly. It does not.

123 Cong. Rec. S15,038-39 (1977) (remarks of Sen. Williams and Sen. Hatch) (*Legislative History* 80) (emphasis added).

> the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. *The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents.* (S. Rep. No. 95-331 at 6.)

44 *Fed. Reg.* 23,804 (April 20, 1979) (emphasis added). "Thus it is clear that EEOC's answer to its Question 21 [and 22] is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles." *Lockheed, supra*, 680 F.2d at 1246 n.3.

Based on the foregoing analysis and authorities, the Shipyard submits that the court below clearly erred in relying on the PDA in resolving the question presented for review. The PDA did not affect an employer's obligations with respect to male employees and did not impose new obligations with respect to the spouses or dependents of employees. Nor does the PDA, or any other provision of Title VII, prohibit an employer from deciding that its health insurance plan will provide only limited hospitalization benefits, or no such benefits, for pregnancy-related expenses incurred by the dependents of its employees. Accordingly, the Shipyard respectfully submits that this Court should grant the instant Petition in order to correct the erroneous conclusion of the court below on this important issue regarding the proper construction of Title VII.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the *en banc* judgment and opinion of the Fourth Circuit.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,

ANDREW M. KRAMER
Counsel of Record

DEBORAH CRANDALL

RONALD LINDSAY
Attorneys for Petitioner

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400

Dated: September 10, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 81-1283, 81-1307

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellee,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and JOHN MCNULTY,
Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellee.

June 22, 1982

Before BUTZNER, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, and CHAPMAN, Circuit Judges.

PER CURIAM: The judgment of the district court is reversed, and this case is remanded, for the reasons set forth in the panel opinion written by Senior Circuit Judge Haynsworth. Judge Widener, Judge Hall, and Judge Chapman dissent for the reasons set forth in Judge Hall's dissent to the panel opinion. *See* Newport News Shipbuilding and Dry Dock Company v. Equal Employment Opportunity Commission, 667 F.2d 448 (4th Cir. 1982).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 81-1283, 81-1307

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellee,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and JOHN MCNULTY,
Defendants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellee.

January 7, 1982

Before HAYNSWORTH, Senior Circuit Judge, and BUTZNER and HALL, Circuit Judges.

HAYNSWORTH, Senior Circuit Judge:

The question is the reach of the Pregnancy Discrimination Act.[1] If an employer provides medical insurance

[1] Section 701(k) of Title VII, 42 U.S.C.A. 2000e(k).

coverage for his employees, the Pregnancy Discrimination Act clearly prohibits any exclusion of, or special limitations upon, benefits payable with respect to pregnancy-related disabilities. The question before us is whether an employer which extends such medical insurance benefits to the spouses of employees may limit benefits payable with respect to a spouse's pregnancy-related disability. We conclude that such a limitation is a violation of the Act.

I.

Newport News Shipbuilding and Dry Dock Company provides a hospitalization and medical-surgical health insurance plan for its employees. Coverage is extended to their spouses and unmarried children between the ages of 14 days and 19 years. The benefits include the full cost of a semi-private hospital room for up to 120 days and for other necessary hospital and medical expenses while hospitalized up to 100 per cent of the first $750 and 80 per cent of the excess for up to 120 days. The plan contains no special limitation upon benefits payable with respect to a pregnancy-related disability of a female employee. With respect to maternity benefits payable upon the delivery of a child of the spouse of a male employee, the plan provides full coverage for charges by physicians, but there is a $500 limitation upon the hospital charges in the absence of complications. To the extent that the hospital charges in connection with an uncomplicated delivery may exceed $500, therefore, a male employee receives less complete coverage of spousal disabilities than does a female employee.

A male employee filed a charge with the EEOC alleging discrimination against him arising out of the limitations upon hospital charges incurred in connection with a spouse's uncomplicated delivery of a child. The charge found support in the EEOC's Final Interpretive Guidelines on Sex Discrimination: Questions & Answers 21 and

22.[2] It is there stated that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions."

Prompted by the filing of that complaint, the company sought in the district court a declaratory judgment that the guidelines were unauthorized and an injunction against their implementation and enforcement. Later, the EEOC filed its complaint against the company alleging discrimination on the basis of sex in the company's provision of health benefits.

The district court ruled for the company in the first case holding that the Pregnancy Discrimination Act applied to employees, but not to spouses of employees. *See Newport News Shipbuilding and Dry Dock Company v. Equal Employment Opportunity Commission*, 510 F. Supp. 66 (E.D.Va.1981). The EEOC's complaint was then dismissed, and appeals in both cases were consolidated here.

II.

The subsection added by the Pregnancy Discrimination Act to § 701 of Title VII of the Civil Rights Act of 1964, in pertinent part reads as follows:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ."

With emphasis upon the second clause of the subsection and particularly the words "for all employment-related

---

[2] 44 Fed.Reg. 23807-808 (April 20, 1979).

purposes", the company contended, and the district court held, that the subsection applied only to employees and benefits payable with respect to their disabilities and not to benefits payable with respect to the disabilities of spouses of male employees. In the background, of course, is the Supreme Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), which held that an employer, in providing disability insurance benefits for its employees, could exclude pregnancy-related disabilities. The Supreme Court had reasoned that classifications concerning pregnancy were not necessarily sex-based. The classification put pregnant women in one class and non-pregnant persons of both sexes in the other. The Supreme Court's decision in *Gilbert*, or course, triggered enactment of the Pregnancy Discrimination Act. The company, however, contends that the Congress intended no more than to circumvent the specific holding of the Supreme Court in *Gilbert* and construes the statute to extend benefits only to female employees and female applicants for employment. In any other context, including the context of this case, it is contended that the Supreme Court's decision in *Gilbert* remains unaffected.

The language of the statute is tortured by that construction. When an employer considers extension of medical benefits to the spouses of employees, it does so with an "employment-related purpose" just as it does when it considers the extension of such benefits to employees. Benefits would never be extended to spouses if the extension did not serve an employment-related purpose. The first clause of the subsection provides that the terms "because of sex" and "on the basis of sex" include because of, or on the basis of, pregnancy, childbirth and related medical conditions. By statutory definition those disabilities are within the meaning of the word "sex." There is nothing in the first clause to suggest that the definition will vary depending upon the employment status of the pregnant woman. The second clause reads quite

harmoniously with the first, since coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected"; it does not say "as other *employees* not so affected."

The district court found support for its conclusion in some legislative history. There were references on the floor of each house to a purpose to extend protection to "working women" or "pregnant workers", but Senators Bayh and Cranston referred specifically to the problem presented here. Each thought that if an employer provides full coverage for spouses of female employees full coverage must be provided for the spouses of male employees.[3] Senate Report No. 95-331, 95th Cong., 1st Sess. 5-6 (1977) does contain a passage which suggests that the Senate Committee thought this an open question.

> It was suggested before this committee that an effect of Title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.
>
> On the other hand, the question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude

[3] See 123 Cong.Rec. 29642 (1977); 123 Cong.Rec. 29663 (1977).

> conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

If the Senate Committee thought the question an open one, however, that fact provides no platform for the company's contention that the question should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act. Upon enactment, the new subsection became an integral part of Title VII. If the Senate Committee thought that the question would be resolved in subsequent litigation, the statute to be applied surely would be the statute as it existed at the time the operative facts developed.

We cannot read the statute so narrowly as to overturn the specific holding in *Gilbert* without affecting the reasoning upon which that holding was based. The language of the new statute strongly indicates a purpose to equate pregnancy, childbirth and related medical conditions with sex. Distinctions based on pregnancy, the Congress said, are distinctions based on sex.

Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

REVERSED AND REMANDED.

K. K. HALL, Circuit Judge, dissenting:

The majority overlooks a critical phrase in the Pregnancy Discrimination Act. The Act provides, in pertinent part:

> "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected *but similar in their ability or inability to work*. . . ." [Emphasis added.]

To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee. To hold otherwise is to simply ignore the language of the Act.

Regardless of one's personal feelings on the matter, pregnancy-based classifications are lawful except to the extent that *General Electric v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) has been limited by the Act. Had Congress intended to completely eviscerate *Gilbert*, it could have easily done so without references to a woman's ability or inability to work.

For these reasons, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and JOHN MCNULTY,
Defendants.

February 25, 1981

AMENDED OPINION AND ORDER

On January 31, 1980, the plaintiff, the largest private employer in the Commonwealth of Virginia, filed a Complaint seeking a declaratory judgment and a permanent injunction against the Equal Employment Opportunity Commission's (EEOC), implementation and enforcement of "Final Interpretive Guidelines" Numbers 21 and 22, interpreting the Pregnancy Discrimination Act, Public Law 95-555, 42 U.S.C. § 2000e-(k) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq* (Title VII), and against defendant United Steelworkers of America, AFL-CIO-CLC (Steelworkers) (the bargaining agent for many of the plaintiffs' employees), and John McNulty, an employee, which have filed charges with the EEOC seeking enforcement, in effect, of these "Final Interpretive Guidelines" against the plaintiff. The plaintiff contends that the EEOC guidelines which would require the plaintiff to extend pregnancy-related benefits to spouses of male employees who are not themselves employees are ultra vires the statutory power of the EEOC,

contrary to the intent of Congress, arbitrary, capricious, and not in accordance with law. The EEOC contends that its guidelines are in harmony with Title VII's prohibition against sex discrimination and are consistent with the legislative history of the Pregnancy Discrimination Act.

The defendant McNulty has filed a charge against the Shipyard complaining that his wife, who is not an employee of the Shipyard, has been denied pregnancy benefits under the Act.

Background and Discussion

In 1976, the Supreme Court, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), held that it was not an unlawful employment practice within the proscription of Title VII of the Civil Rights Act of 1964,[1] as amended, for an employer to provide a disability plan which provided non-occupational sickness and accident benefits to all employees but excluded from its coverage disabilities arising from pregnancy. In determining whether the plan offered by General Electric to its employees violated Title VII, the Court utilized the Equal Protection analysis of a previous Supreme Court decision, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) and stated that, absent a showing of gender-based discrimination as that term was defined in *Geduldig*, or a showing of gender-based effect, there can be no violation of Title VII § 703(a)(1).

In *Geduldig*, the Supreme Court held that excluding pregnancy from a disability program established under California law did not constitute gender-based discrimination in violation of the Equal Protection Clause of the

---

[1] Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

Fourteenth Amendment. The Supreme Court in *Gilbert* cited portions of the *Geduldig* decision:

> [T]his case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefits eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensible disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this one on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups —pregnant women and non-pregnant persons. While the first group is exclusively female the second includes members of both sexes.

429 U.S. at 134-135 citing *Geduldig* at 496-497 n.20. Thus, in *Gilbert* the Supreme Court, using the analysis established in *Geduldig*, found that General Electric's exclusion of pregnancy-related disabilities from coverage in a disability plan did not constitute discrimination on the basis of gender and did not create a gender-based discriminatory effect in violation of Title VII.

On October 31, 1978, Congress, in response to the Supreme Court's decision in *Gilbert*, enacted the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, which amended § 701 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by adding the following subsection:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

The clear legislative intent behind the PDA was to "insure that *working women* are protected against all forms of *employment discrimination* based on sex" as defined by subsection (k). S. Rep. No. 331, 95th Cong., 1st Sess. July 6, 1977 p. 3 (emphasis added). The legislative history specifically states that the Act "does not change the application of Title VII to sex discrimination in any other way." *Id.* at 3. Furthermore, the legislative history of the PDA states explicitly that the Act does not reach the issue of dependents' benefits but that the question of dependents' benefits would have to be resolved using the existing principles of Title VII. *Id.* at 6.

After Congress passed the Pregnancy Discrimination Act, the EEOC issued final interpretive guidelines in the form of questions and answers establishing and clarifying the position of the EEOC on the issue of dependents' benefits. *See* 44 Fed. Reg. 23804 (April 20, 1979). In adopting these guidelines, the EEOC recognized that the PDA did not resolve the question of dependents' benefits and it purported to utilize the existing principles of Title VII in establishing its position. *See* 44 Fed. Reg. 23804. The

two guidelines (in the form of questions and answers No. 21 and 22) challenged in this action are:

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employers' insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions. But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However where the employer provides coverage for the medical conditions of the spouses of its employees, the level of coverage for pregnancy-related medical conditions of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers

> dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employees spouse must be covered at the 50 percent level.

The plaintiff in this action, Newport News Shipyard, maintains a medical plan which pays a major part of the cost of medical and hospital care caused by non-occupational illnesses or accidents of dependents of employees of the Shipyard. The maternity benefits under the plan, however, are limited to $500 of the hospital charges with additional allowances for hospital costs only if there are complications.[2] The defendant McNulty has filed a claim with the EEOC alleging that his wife did not receive the pregnancy-related benefits she is entitled to under the EEOC's interpretation of the Act.

The sole issue before this Court is whether, under the existing principles of Title VII, it is an unlawful employment act for an employer to provide disability coverage for dependents of employees but exclude from that coverage the pregnancy-related expenses of spouses of male employees. The Supreme Court in *Gilbert, supra,* and *Geduldig, supra,* state clearly that the exclusion of pregnancy-related benefits from a disability program does not constitute gender-based discrimination and that, absent a showing of gender-based effect, there can be no violation of Title VII § 703(a)(1). Although the PDA carved out a narrow exception with respect to female employees or applicants for employment, it clearly did "not change the application of Title VII to sex discrimination in any other way." S. Rep. No. 331, 95th Cong., 1st Sess. July 6, 1977 p.3. Thus, in situations not involving female employees or applicants for employment, the principles of Title VII as enunciated in *Gilbert, supra,* remain unchanged.

---

[2] The record does not indicate whether the Shipyard pays for the pregnancy-related disabilities of its female employees. However, there has been no challenge to the plan on that ground.

Guidelines established by the EEOC are, of course, entitled to consideration in determining legislative intent. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). However, Congress, in enacting Title VII did not confer upon the EEOC the authority to promulgate rules or regulations pursuant to that Title. *Albemarle*, at 431 *supra*. Consequently, EEOC guidelines are interpretive guidelines and as such represent only an agency's interpretation of the law, *Association of American R.R.* v. *United States*, 603 F.2d 953, 962 (D.C. Cir. 1979) and "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." 429 U.S. at 142 (citations omitted). In *Gilbert* the Supreme Court stated that the weight accorded to interpretive rulings such as the EEOC guidelines will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 429 U.S. at 142 *citing Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The EEOC guidelines in question do not fare well under these standards. The EEOC guidelines directly contradict the Title VII principles of sex discrimination as defined by the Supreme Court in *Gilbert* and which, with the exception of female employees and applicants for employment, remain in force unaltered by the PDA. Furthermore, the guidelines attempt to accomplish what Congress explicitly chose not to do. The guidelines in question attempt to extend the reaches of Title VII by requiring employers who provide disability plans for spouses of employees to include in those plans pregnancy-related expenses. The legislative history of the PDA states that the PDA does not deal with the question of dependents' benefits. Congress contemplated the precise issue dealt with in the EEOC guidelines, yet chose to

leave that issue to be determined on the basis of the existing principles of Title VII. *See* Floor Debate on S. 995 Sept. 16, 1977 (pp. 15035-15060); S. Rep. No. 331, 95th Cong., 1st Sess. July 6, 1977 p. 6. Congress was aware at that time of the Supreme Court's decision in *Gilbert* defining sex discrimination for the purposes of Title VII and acknowledged that the PDA did not alter the application of Title VII to sex discrimination in any other way. *Id.* at 3. The Court notes also that the EEOC has flatly contradicted itself in the past in enunciating its position on the proper interpretation of the sex discrimination provisions of Title VII and for this reason EEOC guidelines were given little deference by the Supreme Court in *Gilbert*. For these reasons, the Court declines to defer to the EEOC guidelines in determining whether under the existing principles of Title VII it is an unlawful employment act for an employer to provide disability coverage for dependents of employees but exclude from that coverage the pregnancy-related expenses of spouses of male employees.

Conclusions

The Supreme Court in *Gilbert* held that the exclusion of pregnancy-related expenses from an employer's disability plan does not constitute gender-based discrimination and that, absent a showing of gender-based effect, there can be no violation of Title VII § 703(a)(1). The PDA altered this only with respect to female employees and applicants for employment, leaving intact the principles previously enunciated by the Supreme Court in *Gilbert*. Therefore, based on the existing principles of Title VII as set forth by the Supreme Court in *Gilbert* and set out in the Opinion of this Court, we HOLD that the disability plan of the plaintiff, which provides disability coverage for dependents of employees but limits that coverage with respect to pregnancy-related expenses of spouses of employees does not constitute gender-based discrimination. Furthermore, the Court notes that there has been no showing that the plan, by limiting its cover-

age of pregnancy-related expenses of spouses of male employees has caused any gender-based effect in violation of Title VII § 703(a)(1). Accordingly, the Court HOLDS that the plaintiff's disability plan does not violate Title VII, EEOC Guidelines NO. 21 and 22 notwithstanding. The Court FINDS that an actual controversy exists within its jurisdiction from the admitted circulation of the questioned guidelines to the Shipyard's employees, the admitted espousal of the guidelines by the Union, and from the claim of McNulty. 28 U.S.C. § 2201. Therefore, the Court DECLARES that EEOC Guidelines No. 21 and 22 are contrary to law and are of no force and effect and that the defendant McNulty and his wife are not entitled to any benefits under the Act not presently provided to them by the plaintiff.

Injunctive Relief

The Complaint filed by the plaintiff states in paragraph 1:

> Plaintiff seeks a declaratory judgment and a permanent injunction against the Equal Employment Opportunity Commission's . . . implementation and enforcement of . . . Interpretive Guidelines concerning "The Pregnancy Discrimination Act," . . . and against the Defendants United Steel Workers of America . . . which have filed charges with the EEOC seeking enforcement . . . of the Final Interpretive Guidelines against Plaintiff.

In its prayer for relief at the end of the Complaint, the plaintiff requests that the Court permanently enjoin the EEOC from enforcing its Final Interpretive Guidelines and that the Court grant such additional relief as the Court may deem just and proper. The Court is of the opinion that the language of the Complaint is sufficiently broad to justify the Court's granting of injunctive relief and is sufficiently specific to apprise both defendants that the relief being sought is to enjoin them

from representing to the Shipyard employees or their dependents that the law mandated that pregnancy benefits be extended to the spouses of employees.

The plaintiff's Complaint has requested injunctive relief against the EEOC and such relief is appropriate. Although it is the final judgment of this Court that Guidelines 21 and 22 are contrary to law and are of no force and effect, these guidelines are published in materials available to the public. Thus, although spouses of employees are not in fact entitled to pregnancy benefits as a matter of law, these published guidelines create the continuing expectation in the mind of the public that they are legally entitled to such benefits. As a result, employees and their families may be making budgetary and other decisions based on these erroneous expectations and Newport News Shipyard may be required to respond to countless unfounded suits by employees and their spouses seeking the pregnancy benefits they have been told they are entitled to. Furthermore, by perpetuating the belief that these benefits are in fact available to spouses of employees, the EEOC, which is entrusted with the responsibility of educating the public in these matters and which is depended upon by the public for such information, would, in fact, be providing the public with false and misleading information and would be disregarding the finality and effect of this Court's judgment in the case.

The EEOC takes the position that if injunctive relief is granted it will interfere with the ability of the EEOC to advise fully persons coming to it for assistance, especially persons claiming to be aggrieved by personnel practices of the Shipyard. Specifically, the EEOC states that an injunction would create the impression that the EEOC cannot accept charges or discuss the merits of charges filed by individuals claiming that the failure to grant pregnancy benefits to spouses of employees is a discriminatory act. The EEOC also claims that an injunctive provision would interfere with the First Amendment

rights of employees and other aggrieved persons seeking assistance from the EEOC.

A provision specifically enjoining the EEOC from representing to any employee of the Shipyard or dependent of any such employee that a dependent of an employee is entitled to pregnancy benefits *by operation of law* does not create the problems which the EEOC fears. Such an Order does not restrain the EEOC from accepting charges or discussing the merits of any claims for pregnancy benefits.

The EEOC also claims that an injunction would raise doubts as to the advice that EEOC employees can give regarding such allegations under the Equal Pay Act, 29 U.S.C. § 206(d). The EEOC has failed to point out how such doubts may come about and in what way advice given by the EEOC would be affected.

With respect to the request of the Shipyard that it be granted an injunction against the Union, the Court FINDS that, at this time, there is no indication that the Union will persist in representing to the public that dependents of employees of the Shipyard are entitled to pregnancy benefits as a matter of law. Accordingly, the Court DECLINES to issue an injunction against the Union. However, should it appear in the future that the Union is representing to the public that dependents of employees of the Shipyard are entitled to pregnancy benefits as a matter of law, the Court will entertain applications for injunctive relief against the Union at that time.

For the reasons stated in this Order, the EEOC and all of its agents and employees are ENJOINED and RESTRAINED from representing to any employee of the Shipyard or dependent of any such employee that a dependent of an employee is entitled to pregnancy benefits by operation of law.

It is so ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and JOHN MCNULTY,
Defendants.

February 25, 1981

AMENDED JUDGMENT

This action came on for hearing before the Court, Honorable J. Calvitt Clarke, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant John McNulty and his wife are not entitled to any benefits under the Act not presently provided to them by the plaintiff;

FURTHER that the EEOC and all of its agents and employees are ENJOINED and RESTRAINED from representing to any employee of the Shipyard or dependent of any such employee that a dependent of an employee is entitled to pregnancy benefits by operation of law.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

Civil Action No. 80-237-NN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Defendants.

February 4, 1981

ORDER

This matter comes before the Court on the defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted. Rule 12(b), Fed. R. Civ. P.

For the reasons stated in the Court's Opinion and Order in Civil Action No. 80-20-NN, *Newport News Shipbuilding and Dry Dock Company* v. *Equal Employment Opportunity Commission*, the Court concludes that the plaintiff has failed to state a cause of action for which relief may be granted, and the Motion to Dismiss is GRANTED.

The Complaint is DISMISSED with prejudice.

/s/ J. Calvitt Clark, Jr.
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1283

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellee,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, and JOHN MCNULTY,
Defendants.

June 22, 1982

JUDGMENT

Appeal From the United States District Court
for the Eastern District of Virginia

THIS CAUSE came on to be heard on the record and the petition for rehearing, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the U.S. District Court for the Eastern District of Virginia, at Newport News, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1307

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, and JOHN MCNULTY,
Defendants.

June 22, 1982

JUDGMENT

Appeal From the United States District Court
for the Eastern District of Virginia

THIS CAUSE came on to be heard on the record and the petition for rehearing, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the U.S. District Court for the Eastern District of Virginia, at Newport News, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

APPENDIX H

HOSPITALIZATION

AND

MEDICAL-SURGICAL PLAN

for

Production, Maintenance, Technical
and Clerical Unit
Eligible Employees

PLAN IDENTIFICATION NUMBER
NNS (PN) - 504

NEWPORT NEWS SHIPBUILDING
A Tenneco Company Newport News, Virginia

INTRODUCTION TO NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY HOSPITALIZATION/MEDICAL/SURGICAL PLANS FOR PRODUCTION, MAINTENANCE, TECHNICAL AND CLERICAL UNIT ELIGIBLE EMPLOYEES

As a participant in Newport News Shipbuilding and Dry Dock Company Basic Hospitalization and Medical-Surgical Service and Major Medical Expense Benefit Plans for Production, Maintenance, Technical, and Clerical Unit Employees, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

> Examine, without charge, at the Plan Administrator's office, all plan documents, including collective bargaining agreements, and copies of all documents filed by the Plan with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.
>
> Obtain copies of all plan documents and other plan information upon written request to the Plan Administrator. The Administrator may make a reasonable charge for the copies.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries.

No one, including your employer, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA.

If your claim for a benefit is denied in whole or in part, you must receive a written explanation of the rea-

son for the denial. You have the right to have the Plan Administrator review and reconsider your claim.

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the Plan Administrator to provide the materials and pay you up to $100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the Administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court.

The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous.

If you have any questions about your plan, you should contact the Plan Administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor Management Services Administration, Department of Labor.

TABLE OF CONTENTS

	Page
Administration of Plan	[28a]
Participation	[29a]
Coverage	[31a]
Claim Procedure	[39a]
Appeal Procedure	[40a]
Loss of Benefits	[42a]
Coverage after Termination	[44a]
Conversion of Coverage	[46a]
Effect of Medicare on Active and Retired Employees	[47a]
Appendix	[49a]

NEWPORT NEWS SHIPBUILDING

HOSPITALIZATION AND MEDICAL-SURGICAL PLAN

for Production, Maintenance, Technical and Clerical Unit Eligible Employees

1. What is the Hospitalization and Medical-Surgical Plan?

It is a group medical plan designed to help employees provide quality health care for themselves and their families. The Plan does so by paying a major part of the cost of medical care caused by non-occupational illnesses or accidents. Work related illnesses or accidents are covered through the employer's Workers' Compensation program.

2. What are the Plan and employer identification numbers?

The Plan Identification Number is NNS(PN)-504. The employer Identification Number is NNS 54-0318880.

3. When was the Hospitalization and Medical-Surgical Plan established?

It was established February 26, 1951.

4. How are Plan records maintained?

All Plan records are maintained on a calendar year basis (January 1 to December 31).

5. Who pays the cost of the Plan?

Each participating company pays the cost of providing the medical coverage for its employees. Employees are not required to contribute. (Refer to Appendix I for a list of participating companies.)

6. Who is the Plan Administrator?

Newport News Shipbuilding and Dry Dock Company
Benefits Committee
4101 Washington Avenue
Newport News, Virginia 23607
(804) 380-7886

7. Who is the Agent for Service of Legal Process?

V. F. Ewell, Jr., Vice President and General Counsel
Newport News Shipbuilding and Dry Dock Company
4101 Washington Avenue
Newport News, Virginia 23607

PARTICIPATION

8. Who may participate in the Plan?

All active, full time, production, maintenance, technical and clerical areas' bargaining-unit eligible employees become plan participants on the first day following three months of continuous service provided they are actively at work on that day.

9. Are dependents covered under this Plan?

Yes. Dependents are covered at the same time as employees.

10. How does the Plan define dependents?

Dependents are:

A. An employee's spouse

B. An employee's unmarried children who are at least fourteen days of age, but under nineteen years of age.

11. Does the Plan include adopted children and stepchildren as dependents?

Yes. The Plan includes a legally adopted child as well as a stepchild residing in an employee's home. It

also includes a child permanently living in an employee's household who is solely supported by the employee and who is between 14 days and 19 years of age.

12. Is coverage extended to dependents older than 19 years of age?

Yes. Coverage is extended after age 19 to the following dependents:

A. unmarried children up to age 23 who are full-time students at a college and who depend solely upon an employee for maintenance and support, and

B. unmarried children regardless of age who are mentally or physically handicapped and who:

1. become totally and permanently disabled while covered under the Plan,

2. are unable to engage in substantially all of the normal activities of a person of like age and sex, and

3. depend solely upon an employee for support and maintenance.

Note: The intent of the Plan is to provide coverage for dependent children who continue their education uninterrupted from high school through college, or mentally or physically handicapped children who are unable to support themselves.

13. How is Plan coverage extended for children 19 years of age or older?

Application for extension of coverage beyond age 19 for full time students or mentally or physically handicapped children, must be made within 31 days after the dependent child reaches age 19 at the Health Claims Office located at 210 39th St., Newport News, Va.

COVERAGE

14. What is a covered expense?

A covered expense is any medical expense necessary for the treatment of an illness or injury not specifically excluded or otherwise limited under the Plan.

Examples:

A. Treatment by a family physican for a cold is a covered expense. However, a routine physical examination, where no illness is evident, is not a covered expense.

B. Inoculation for treatment of an existing illness or disease is a covered expense. Inoculation designed to prevent an illness or disease is not a covered expense.

C. Cosmetic surgery that is necessary for the prompt repair of an accidental bodily injury is a covered expense. Cosmetic surgery performed solely to alter or improve one's appearance is not a covered expense.

15. How is coverage provided?

Coverage is provided by the Company through a self-administered hospitalization plan, which is in conformity with the terms and conditions of Article XXIV of the prior Collective Bargaining Agreement. Coverage is provided by either the Basic Plan (discussed in question 16) or Major Medical Plan (discussed in question 19).

Note: Payment of benefits are made from the Company's operating funds in accordance with plan provisions.

16. What does the Basic Plan pay?

The Basic Plan pays in full for:

- A semi-private hospital room, intensive care and coronary care units for up to 120 days.
- Hospital services (including general nursing care, x-ray examinations, drugs) and other necessary

services while hospitalized up to 100% of the first $750, then 80% of the excess up to 120 days.

17. Are separate hospital confinements considered as one period of disability?

Yes, unless satisfactory evidence is provided that:

A. the causes of the separate hospital confinements cannot be connected in any way, or

B. between the hospital confinements the following has occurred

- the employee or dependent has recovered completely from all causes of the previous hospital confinements
- the employee has returned to work for one full day, or
- the dependent has not been hospital confined for at least ninety (90) days.

18. How is "reasonable and customary benefit" defined by the Plan?

This benefit is the average amount charged by doctors providing the same service in the same local area, and is determined by the Newport News Shipbuilding Benefits Committee based on Newport News Shipbuilding computer data which is periodically updated.

19. What does the Major Medical Plan pay?

The Major Medical Plan protection provides an additional $25,000 in lifetime health protection for each employee and eligible dependent. Under the Major Medical Plan, employees are eligible for reimbursement of 80% of reasonable and customary expenses, after a $100 deductible.

20. Is there a maximum lifetime benefit payable under the Major Medical Plan?

There is a maximum lifetime benefit of $25,000 for each employee and covered dependent. Benefits paid during the year are restored every January 1. The maximum

restoration each year is $2,000, up to the maximum benefit of $25,000.

Example: Assume that you had Major Medical expenses totaling $5,000 paid by the Plan in the last calendar year. You also have two dependents, "I" "II," and they had Major Medical expenses totaling $1,000 and $3,000 respectively during the same calendar year. The following shows how the annual restoration works:

		DEPENDENTS	
	Employee	I	II
Maximum lifetime benefit	$25,000	$25,000	$25,000
Major Medical expenses paid	5,000	1,000	3,000
Remaining lifetime maximum	$20,000	$24,000	$22,000
Annual restoration	2,000	1,000	2,000
Lifetime Maximum Benefit After Restoration	$22,000	$25,000	$24,000

21. Is there a deductible for the Major Medical Plan?

Yes, there is a $100 deductible for each family member during a calendar year before Major Medical expense benefits are payable for that individual.

The deductible will apply only once in a calendar year, even though there may be several non-occupational injuries or diseases during the year. Any expenses incurred during the last three months of a calendar year applied against the deductible for that year may also be applied against the deductible for the next calendar year.

For example: Assume that you have these expenses during October, November and December

Doctor's office visits for cold		$40.00
Prescribed drugs for cold		20.00
	Subtotal	$60.00

At this time you have no benefits due from the Plan because your expenses have not exceeded the $100 calendar year deductible.

Assume that in the following year you have the expenses listed below:

Doctor's office visits for illnesses	$ 90.00
Injection for cold	15.00
Prescribed drugs for illnesses	50.00
Subtotal	$155.00
Add expenses from last three months of previous year	$ 60.00
Total Expenses	$215.00
Calculation of Benefits Payable:	
Covered Expenses Claimed	$215.00
Less Calendar Year Deductible	100.00
Subtotal	$115.00
Multiplied by covered Expense Factor	80%
Amount the Major Medical Plan would pay	$ 92.00

22. What is meant by the term "Physician or Surgeon"?

The term means a physician or surgeon who is a Doctor of Medicine (M.D.), who is licensed to practice medicine and perform surgery, and who is not a member of the employee's immediate family.

23. Are services performed by chiropractors covered?

Yes. Coverage is provided under the Major Medical Plan.

24. Are services performed by Christian Science practitioners covered?

Yes, but only if the practitioners are listed in "The Christian Science Journal."

25. What is "Coordination of Benefits"?

Coordination of Benefits is a method of integrating benefits payable under more than one group health insurance plan so that the insured's benefits from all sources do not exceed 100% of the allowable medical expenses.

The amount payable under the Plan will take into account any coverage under other group health insurance plans but not individual policies. The benefits payable

under this Plan will be coordinated with the benefits of other plans. Specifically, this Plan will always pay either the regular benefits in full or a reduced amount which, when added to the benefits payable by other plan(s), will equal 100% of the allowable expenses.

26. Are there any additional facts regarding "Coordination of Benefits" that I should keep in mind?

The following points should always be kept in mind regarding Coordination of Benefits:

- Coordination of Benefits is the practice of the insurance industry.
- If the spouse of an employee works and is eligible for group health care coverage, the employee's personal coverage (under this Plan) is unaffected.

  However, the coverage of the spouse and dependent children may be provided through the coordinated approach discussed above.
- The employed male family member's coverage is primary for himself and dependent children.

For example:

Person Sick or Injured	*Who Pays First*
A. Employee	Newport News Shipbuilding Hospital, Medical, Surgical and Major Medical Plan
B. Spouse of an employee who is employed elsewhere.	Spouse's Group Plan
C. Children of MALE employee whose wife is employed elsewhere	Newport News Shipbuilding Hospital, Medical, Surgical and Major Medical Plan
D. Children of FEMALE employee whose husband is employed elsewhere.	Father's Group Plan

- Examples of typical plans with which the Hospital, Medical, Surgical and Major Medical Plan coordinates are:

  A. Blue Cross and Blue Shield;

  B. Champus;

C. Medicare, and

D. Other Hospital, Medical, Surgical and Major Medical expense plans provided through insurance carriers such as:

(1) Aetna

(2) Metropolitan

(3) Travelers

- This Plan does not coordinate Benefits with other Newport News Shipbuilding Health Care Plans.

Note: No person may be eligible for benefits both as an employee and as a dependent nor as a dependent of more than one employee.

27. What happens when an individual is hospitalized for more than 120 days?

Charges for Room and Board, hospital services and physicians are covered under the Major Medical Plan.

Example: Assume that you are confined to a hospital for 130 days. Charges will be broken down as follows:

	Charges	Charges Paid Under The Basic Plan For The First 120 Days		Charges Covered By The Major Medical Plan After 120 Days
Room & Board ($70 per Day)	$ 9,100.00	$ 8,400.00		$ 700.00
Miscellaneous				
First 120 Days	1,800.00	1,590.00		—
After 120 Days	200.00	—		200.00
Surgeon	1,500.00	1,500.00		—
Physicians				
First 120 Days	1,100.00	1,100.00		—
After 120 Days	100.00	—		100.00
				$1,000.00
	—	—	Less Deductible	(100.00)
	—	—		$ 900.00
	—	—	Paid by Major	x 80%
Totals	$13,800.00	$12,590.00	Medical	$ 720.00

The total charges amount to $13,800.00. The Basic Plan paid $12,590.00 and the Major Medical Plan paid $720.00, therefore the Hospitalization and Medical-Surgical Plan has paid a total of $13,310.00. You pay only $490.00.

28. What maternity benefits are provided?

A. The Basic Plan pays up to $500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges.

B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement as described in question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

C. Maternity benefits for the wife of a male employee will continue to be paid as described in part "A" of this question.

29. Are expenses for surgery performed in the Doctor's office covered?

Yes. Surgery performed in a Doctor's office is covered for 100% of the reasonable and customary charges.

30. Is oral surgery covered under the Plan?

A. The Basic Plan provides limited coverage for oral surgery as follows:

1. surgical removal of impacted teeth,
2. removal of tooth root without extraction of the entire tooth,
3. cutting or filling of a root socket, and
4. certain surgical procedures on the gums and tissues of the mouth.

If you have any questions about planned oral surgery, contact your Plan Administrator to determine if your planned surgery is covered.

31. Does the Plan pay for accidental injury to teeth?

The Major Medical Plan will pay 80% of reasonable and customary charges, after the $100 deductible, for the prompt repair of natural teeth as a result of a non-occupational accident.

32. What coverage is provided for accidental bodily injury?

The Basic Plan covers the actual hospital or doctor's charges for the first treatment of a non-occupational injury. This first treatment must be on the day of the injury or the next day following. Charges after the initial treatment are covered under Major Medical.

33. What coverage is provided for sudden and unexpected severe illness?

The Basic Plan covers the actual hospital emergency room and resident physician's charges for the first treatment.

34. How does the Plan define "sudden and unexpected severe illness"?

It means an urgent need for emergency medical care and an actual hazard to life. In order to be a covered expense, the medical care must be rendered by a hospital emergency room.

35. Will the Plan pay for a private hospital room?

No. The Plan will pay up to 100% of the hospital charges for semi-private rooms only.

36. Does the Plan provide coverage for mental care when a covered family member is not hospitalized?

Yes. Major Medical provides 50% of the reasonable and customary charges for drugs, x-rays and physician's expenses, after the $100 deductible.

37. What expenses are paid under the Major Medical Plan only?

The Major Medical Plan pays 80% of the reasonable and customary charges for the following (after the $100 deductible):

- Outpatient x-ray and radioactive isotopes therapy.
- Outpatient diagnostic x-ray and laboratory examinations.
- Physician's home and office visits.
- Special-duty registered nurse or licensed practical nurses.
- Registered physical therapist while hospitalized.
- Initial purchase of artificial limbs, eyes and durable equipment (iron lung, wheel chairs, etc).
- Ambulance service to the nearest hospital from scene of an accident or place where stricken by a severe illness.
- Consultation services (only one consultation expense will be allowed during each hospital confinement).
- Prescription drugs.

All expenses shown above are subject to the $100 deductible described in question 21.

CLAIM PROCEDURE

38. How do you file a claim?

A. If your claim is for expenses incurred while hospitalized, the hospital and/or physician normally will file the claim for you.

- The hospital's normal billing will be accepted by the Health Claims Office.
- Form NN 4060 (Health Claims Form) is required for physician's expenses when hospitalized.

B. If your claim is for outpatient treatment, the hospital and/or physician normally will bill you directly and you must file the claim.

- It is important to indicate your social security number when submitting a claim.
- Form NN 4060 is required for all physician's charges.

C. You must submit all claims within 90 days.

D. Bills for prescription drugs must be itemized on GC 203 Prescription Drug Record. Form GC 203 is available from the Health Claims Office.

E. When the services are provided in the Hampton-Newport News area, the provider of the service usually will have the proper claim form for you.

F. If the service is provided outside of the Hampton-Newport News area, it will be necessary for you to obtain the proper claim form from the Health Claims Office, 210-39th St.

39. Is there a limitation placed on the time required to file a claim for Major Medical Benefits?

Yes. Health Claims will not accept a claim submitted after December 31 of the year following the year in which the expense was incurred.

APPEAL PROCEDURE

40. What can I do in the event a claim for benefits is denied?

The Plan provides a review procedure which allows you to appeal a denied claim.

If you have made a claim for benefits (following the procedure defined in question 38) and any portion of the claim is denied, Health Claims will send you a written notice stating the reasons for the denial.

41. What steps do I follow if I want to apply for a review?

Step 1—Within ninety (90) days after the date of written notice denying any benefits, a participant, or an authorized representative of a participant, may request a review of the decision by writing to the Benefits Administrator:

Newport News Shipbuilding and Dry Dock Company
Employee Benefits Office
210 39th Street
Newport News, VA 23607

You will have reasonable time, usually thirty (30) days after requesting the review, to submit, in writing, the reasons why the claim should not have been denied. It is important that these comments be made as early as possible so they may be given thorough consideration.

A written response by the Benefits Administrator will include specific reasons for the decision. It will be made as promptly as possible, in the usual case within sixty (60) days after receipt of the request for review.

Step 2—Within ninety (90) days after the date of written notice denying any benefits, a participant, or an authorized representative of a participant, may request a review of the decision by writing to the Director of Personnel:

Newport News Shipbuilding and Dry Dock Company
Employee Benefits Office
3800 Washington Avenue
Newport News, VA 23607

You will have reasonable time, usually thirty (30) days after requesting the review, to submit, in writing, the reasons why the claim should not have been denied.

It is important that these comments be made as early as possible so they may be given thorough consideration.

A written response by the Director of Personnel will include specific reasons for the decision. It will be made as promptly as possible, in the usual case within sixty (60) days after receipt of the request for review.

Step 3—If the claim for benefits is wholly or partially denied by the Director of Personnel, you or your authorized representative may request in writing within sixty (60) days of that denial, a final review of the claim.

Address you request to:

Newport News Shipbuilding and Dry Dock Company
Benefits Committee
4101 Washington Avenue
Newport News, VA 23607

The record of previous review will be forwarded to that office along with any supporting documents you wish to submit, and a decision will be made based on these records. You or your authorized representative will receive notice of the decision within sixty (60) days.

You or your authorized representative may review pertinent documents at any time at the Plan Administrator's office at 210—39th St. during regular business hours.

LOSS OF BENEFITS

42. Under what conditions would I not receive payment of my claim?

A. Failure to submit the properly completed claim form would result in the claim being returned to you (refer to question 38 for claim procedure).

B. Failure to file a claim within the specified time limits detailed in question 39.

C. Claims submitted for expenses not covered by the Plan. No benefits are payable for the expenses listed below, and the amount of any such charges will be deducted from the incurred expenses before the benefits of the Plan are determined.

1. Charges that would not have been made if no coverage existed or charges that neither you nor your dependents are required to pay.
2. Benefits provided by reason of the past or present service of any person in the armed forces.
3. Charges in connection with hospital confinement or any surgical, medical or other treatments not recommended and approved by the attending physician.
4. Charges for care, treatment, services or supplies not necessary for the treatment of the injury or disease concerned.
5. Unreasonable charges for care, treatment, services or supplies.
6. Charges by a licensed psychologist, unless the services are recommended by and are under the direction of a psychiatrist.
7. Charges in connection with any injury or disease arising out of or in the course of employment, where such treatment would be paid under Workers' Compensation.
8. Charges incurred by an individual who is not a covered family member.
9. Charges incurred by any individual arising from an act of violence or riot, if such individual is determined to be the aggressor.
10. Charges for routine physical examinations.

11. Charges for well baby care (routine charges made by the hospital and doctor for the care of a normal, healthy newborn).

12. Charges for non-prescription drugs and medicines.

13. Charges for pre-existing conditions for which treatment, drugs or medical services were provided within the three (3) month period immediately preceding the date coverage would otherwise start.

14. Charges for eyeglasses for any reason.

D. Termination of employment results in an immediate loss of benefits.

E. Failure to meet the eligibility requirements of the Plan at the time the expense was incurred results in a loss of benefits.

F. No benefit is payable if Newport News Shipbuilding discontinues or changes the Plan so that an employee would no longer be able to participate in the Plan or if any participant employer (See Appendix I) discontinues the Plan with respect to all of its employees.

COVERAGE AFTER TERMINATION

43. What happens to my coverage if my employment terminates?

Coverage ends on the date of termination. However, pregnancy will be covered under the following guidelines *provided the conception occurs while covered under this Plan:*

A. If termination occurs before April 29, 1979, female employees and the spouses of employees are covered for the actual hospital charges up to $500 for that one pregnancy.

B. If termination occurs on or after April 29, 1979, the spouse of a male employee will be covered as explained in Part A above. However, in the case of a female employee who terminates on or after April 29, 1979, maternity benefits will be paid the same as any other hospital confinement for that one pregnancy.

44. What happens to my coverage if I am laid off due to lack of work?

Your coverage will terminate on the last day of the month following the month in which you are laid off. If you wish to continue your coverage beyond this period of time then you must convert to an individual policy in accordance with question 49.

45. What if I or one of my eligible dependents is "totally disabled" at the time my coverage terminates?

If coverage terminates for a "totally disabled" covered member the coverage for that disabled family member continues only for any expenses incurred during the uninterrupted period of that same disability for up to three months for the Basic Plan and one year for the Major Medical.

46. How does the Plan define "totally disabled"?

For an employee, the Plan defines "totally disabled" as preventing the employee from engaging in his regular or customary occupation and from performing work of any kind for compensation.

In the case of a dependent or retired employee, the Plan defines "totally disabled" as injury or disease that prevents engaging in substantially all of the normal activities of a person of like age and sex who is in good health.

47. What will happen to Plan coverage for my dependents if I should die?

Coverage for dependents terminates upon death of the employee. However, dependents have the right to con-

version in accordance with the "Conversion Privilege" discussed in question 48.

CONVERSION OF COVERAGE

48. What is the "Conversion Privilege"?

If coverage is discontinued because of termination of employment for any reason including layoff due to lack of work (refer to question 44) an employee may apply for an individual policy under certain conditions listed below.

A. The employee and any covered dependents who are under 65 years of age and not eligible for medicare.

B. The employee must have been covered for at least three months under the Hospitalization and Medical Surgical Plan with Newport News Shipbuilding.

49. How do I apply for conversion?

Contact the Health Claims Office immediately for the necessary form and procedures.

Note: Dependents whose coverage terminates because they no longer meet the eligibility requirements of questions 10 or 12 will be eligible to apply for conversion.

50. When do I apply for conversion?

Application for conversion to the individual policy and payment of the first premium must be made within 31 days following the date of termination or within 31 days following the last day of coverage as described in questions 43, 44, 45, 46, and 47.

51. Under what conditions would I be unable to convert to an individual policy?

Coverage cannot be converted if:

A. The employee or the covered dependent is over 65 years of age or eligible for Medicare.

B. The employee has been covered under Hospitalization and Medical-Surgical Plan with Newport News Shipbuilding for less than three months.

C. The individual policy is applied for in a jurisdiction in which the issuing insurance company is not authorized to issue or deliver the policy.

D. The Hospitalization and Medical-Surgical Plan terminates coverage with respect to the class of employees or dependents of which the individual is a member.

E. An individual applying for coverage has other health insurance.

EFFECT OF MEDICARE ON ACTIVE AND RETIRED EMPLOYEES

General Information

52. What is Medicare?

Medicare is a health insurance program run by the Federal Government for people 65 and older and some people under 65 who are disabled. Medicare is a two-part program broken down as follows:

1. Hospital Insurance (sometimes called Part A), and
2. Medicare Medical Insurance (sometimes called Part B).

The Active Employee And Medicare

53. Must I apply for Medicare if I am still an active employee?

Yes. Enrollment in Medicare Parts A and B (when you become eligible) *is essential* for you to maintain maximum coverage under the Hospital, Medical, Surgical Plan. ***The benefits payable under the Plan will be reduced by those benefits payable by Medicare whether you have Medicare coverage or not.***

54. Will benefits under the Plan be coordinated with Medicare when my spouse or myself becomes eligible for Medicare?

Yes. Benefits will be coordinated with Medicare once you or your spouse becomes eligible for Medicare coverage. Medicare will then provide primary coverage and the Plan will provide secondary coverage.

Note: For further information on Coordination of Benefits, see questions numbered 25 and 26.

The Retired Employee
And Medicare

55. What effect does Medicare have on Plan coverage for retired employees?

Plan coverage for a retired employee or eligible spouse terminates when the person becomes eligible for Medicare.

56. What type of coverage is available under the Hospitalization and Medical-Surgical Plan for a retired employee?

A retired employee, an eligible spouse of a retired employee, or a widow/widower who was an eligible spouse of a retired employee is eligible for basic benefits under the Hospitalization and Medical-Surgical Plan until each becomes eligible for Medicare. However, Major Medical benefits are not available.

57. Does the Basic Plan coverage for retired employees have a deductible?

Yes. The benefits provided under the Basic Plan are subject to a $25.00 deductible for each unrelated hospital confinement.

Note: Although this booklet describes the principal features of the Plan, it nevertheless is a summary of the Plan. The complete terms of the Plan are set forth in the Plan document. The Plan document is available for review upon request.

APPENDIX I

Newport News Shipbuilding

Hospitalization and Medical-Surgical Plan

Participating Companies as of February 17, 1975

Newport News Shipbuilding and Dry Dock Company
4101 Washington Avenue
Newport News, Virginia 23607

APPENDIX I

PUBLIC LAW 95-555

95th CONGRESS

AN ACT

To amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.".

SEC. 2. (a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe

benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act.

SEC. 3. Until the expiration of a period of one year from the date of enactment of this Act or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: *Provided*, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: *And provided further*, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

Approved October 31, 1978.

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

ANDREW M. KRAMER
Counsel of Record
GERALD D. SKONING
DEBORAH CRANDALL
DAVID D. KADUE
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
1111 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 463-2400
Counsel for Petitioners

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL N. MARTINEZ
Acting General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506
Counsel for Respondents

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1982
CERTIORARI GRANTED DECEMBER 6, 1982

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

RELEVANT PLEADINGS AND EXHIBITS IN NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"), UNITED STEELWORKERS OF AMERICA ("STEELWORKERS") AND JOHN McNULTY; CIVIL ACTION NO. 80-20-NN (E.D. VA.) 5

Plaintiff's Complaint for Declaratory and Injunctive Relief 5

Exhibit A—Charge of Discrimination Filed with EEOC by John McNulty 15

Exhibit B—Letter from Steelworkers to EEOC 16

Plaintiff's Motion for Summary Judgment 19

Defendant EEOC's Cross Motion for Summary Judgment 21

Defendant EEOC's Answer 23

THE FOLLOWING PLEADINGS AND EXHIBITS IN CIVIL ACTION NO. 80-20-NN HAVE BEEN OMITTED IN PRINTING THIS APPENDIX BECAUSE THEY APPEAR ON THE FOLLOWING PAGES IN THE APPENDIX TO THE PRINTED PETITION FOR A WRIT OF CERTIORARI:

Hospitalization and Medical-Surgical Plan for Production, Maintenance, Technical and Clerical Unit Eligible Employees ..... 24a (App.)

Amended Opinion and Order of the United States District Court for the Eastern District of Virginia ..... 9a (App.)

Amended Judgment ..... 20a (App.)

Relevant Pleadings and Exhibits in EEOC v. Newport News Shipbuilding & Dry Dock Company; Civil Action No. 80-237-NN (E.D. Va.) 28

TABLE OF CONTENTS—Continued

Page

Plaintiff's Complaint 28

Defendant's Motion to Dismiss 32

Attachment "A"—Charges of Discrimination Filed with EEOC by Dalton E. Teed and John McNulty 34

Attachment "B"—EEOC's Determinations of Charges of Discrimination Filed by Dalton E. Teed, Arnol Manning, and John McNulty 35

THE FOLLOWING PLEADINGS IN CIVIL ACTION NO. 80-237-NN HAVE BEEN OMITTED IN PRINTING THIS APPENDIX BECAUSE THEY APPEAR ON THE FOLLOWING PAGES IN THE APPENDIX TO THE PRINTED PETITION FOR A WRIT OF CERTIORARI:

Order of the United States Court for the Eastern District of Virginia ..... 21a (App.)

RELEVANT PLEADINGS AND EXHIBITS IN EEOC v. NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY; NOS. 81-1283 & 81-1307 (4TH CIR.) 39

EEOC's Motion To Supplement Record on Appeal 39

Attachment "A"—Letter dated June 6, 1977 from Jacob K. Javits to EEOC Chair Eleanor Holmes Norton 42

Attachment "B"—Letter dated June 16, 1977 from EEOC Chair Eleanor Holmes Norton, Solicitor of Labor Carin Ann Clauss, and Assistant Attorney General Drew S. Days III to Senator Jacob K. Javits 45

Attachment "C"—Letter dated June 28, 1977 from EEOC Chair Eleanor Holmes Norton, Solicitor of Labor Carin Ann Clauss, and Acting Attorney General James P. Turner to Senator Jacob K. Javits 48

TABLE OF CONTENTS—Continued

Page

THE JUDGMENTS AND OPINIONS IN QUESTION HAVE BEEN OMITTED IN PRINTING THIS APPENDIX BECAUSE THEY APPEAR ON THE FOLLOWING PAGES IN THE APPENDIX TO THE PRINTED PETITION FOR A WRIT OF CERTIORARI:

Opinion of the United States Court of Appeals for the Fourth Circuit After Rehearing En Banc.... 1a (App.)

Opinion of the United States Court of Appeals for the Fourth Circuit .....2a (App.)

Final Judgment of the United States Court of Appeals for the Fourth Circuit in No. 81-1283..22a (App.)

Final Judgment of the United States Court of Appeals for the Fourth Circuit in No. 81-1307..23a (App.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION ("EEOC"),
UNITED STEELWORKERS OF AMERICA
("STEELWORKERS")
and JOHN MCNULTY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1980	
January 31	Complaint for declaratory and injunctive relief filed.
April 1	Motion to dismiss filed by Defendant EEOC.
April 7	Motion to dismiss filed by Defendants Steelworkers and McNulty.
November 19	Order denying motions to dismiss filed.
December 15	Plaintiff's motion for summary judgment filed.
January 2	Defendant EEOC's Answer filed.
January 13	Cross motion for summary judgment filed by Defendant EEOC.
January 14	Answer of Steelworkers and McNulty filed.
January 14	Cross motion for summary judgment filed by Defendants Steelworkers and McNulty.
January 27	Opinion and order filed.
January 27	Judgment filed.
February 4	Motion to amend order filed by Defendants Steelworkers and McNulty.

Date	Proceedings
1980	
February 5	Motion to amend order filed by Defendant EEOC.
February 26	Amended opinion and order filed.
February 26	Amended Judgment filed.
March 17	Notice of Appeal filed by Defendant EEOC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-237-NN

EEOC

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

Date	Proceedings
1980	
December 15	Complaint filed.
January 14	Motion to dismiss filed by Defendant.
February 6	Order granting motion to dismiss filed.
April 1	Notice of Appeal filed by Plaintiff.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 81-1283 & 81-1307

EEOC

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

Date	Proceedings
1981	
April 6	Appeal docketed.
April 23	Order consolidating cases filed.
October 20	Appellant's Motion to supplement record on appeal filed.
January 7	Order granting motion to supplement record on appeal filed.
January 7	Decision and judgments issued.
January 19	Petition for rehearing and suggestion for rehearing en banc filed.
April 12	Order granting petition for rehearing en banc filed.
June 22	En banc decision and judgments issued.
July 9	Motion for stay of mandate filed.
July 13	Order granting stay of mandate filed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING
AND DRYDOCK COMPANY
4101 Washington Avenue
Newport News, Virginia,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

UNITED STEELWORKERS
OF AMERICA, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, Pennsylvania 15222

and

JOHN MCNULTY
3428 Stancil Street
Virginia Beach, Virginia 23452,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiff seeks a declaratory judgment and a permanent injunction against the Equal Employment Opportunity Commission's (The "EEOC") implementation and enforcement of self-styled "Final Interpretive Guidelines" concerning "The Pregnancy Discrimination Act," Pub. L. 95-555 ("The Pregnancy Discrimination Act") and Title VII of the Civil Rights Act of 1964, as amended, by the

Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), and against Defendants United Steelworkers of America, AFL-CIO-CLC (the "Steelworkers") and John McNulty, which have filed charges with the EEOC seeking enforcement, in effect, of the "Final Interpretive Guidelines" against Plaintiff.

2. The Pregnancy Discrimination Act prohibits employers from discriminating against female *employees* or female *applicants for employment* on the basis of pregnancy, childbirth or other related medical conditions, and includes pregnancy in the list of illnesses covered by an employer's fringe benefit plans.

3. The EEOC's "Final Interpretive Guidelines" extend coverage to persons that are *not* employees.

4. Therefore, the gravamen of the Complaint is that the EEOC's "Final Interpretive Guidelines" contravene the intent of Congress and are *ultra vires* the statute; are arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with law.

I. *Jurisdiction and Venue*

5. This court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

6. Plaintiff Newport News Shipbuilding and Dry Dock Company (the "Shipyard") is a corporation authorized to do business in the Commonwealth of Virginia with principal offices located at 4101 Washington Avenue, Newport News, Virginia. It is a resident of this District, and venue is therefore proper in this District under 28 U.S.C. § 1391(e).

II. *The Parties*

7. Plaintiff is a corporation authorized to do business in the Commonwealth of Virginia, and maintains a place

of business located at 4101 Washington Avenue, Newport News, Virginia.

8. Defendant EEOC is an independent agency of the United States established pursuant to Pub. L. 92-261 (42 U.S.C. § 2000(e) *et seq.*) with responsibility to prevent discrimination in employment because of race, color, religion, sex or national origin. Further, pursuant to Pub. L. 95-555, the EEOC was empowered to prohibit discrimination against female employees or female applicants for employment on the basis of pregnancy, childbirth or related medical conditions.

9. Defendant United Steelworkers of America, AFL-CIO-CLC is an association commonly known as a labor union which represents production and maintenance employees of Plaintiff for purposes of collective bargaining at Plaintiff's place of business in Newport News, Virginia, and which maintains an office at 3301 Washington Avenue, Newport News, Virginia 23607.

10. Defendant John McNulty is an employee of Plaintiff.

11. Defendants Steelworkers and McNulty are joined as parties pursuant to Rule 19(a)(2), Federal Rules of Civil Procedure, in that they have an interest in the outcome of this action.

III. *History of Charges Filed by Defendants Steelworkers and McNulty With the EEOC*

12. On September 20, 1979, Defendant McNulty filed a charge of discrimination with Defendant EEOC alleging discriminatory denial of full medical insurance coverage for his pregnant spouse. (Attached as Exhibit "A".)

13. On October 28, 1979, Defendant Steelworkers filed a charge with Defendant EEOC alleging *inter alia*, discriminatory denial of medical insurance benefits to preg-

nant spouses of Plaintiff's employees. (Attached as Exhibit "B".)

14. On September 26 and October 30, 1979, respectively, Defendant EEOC forwarded to Plaintiff a Notice of Charge of Discrimination and Notice of Fact Finding Conference with reference to Defendant McNulty's charge, and Notice of Charge of Discrimination With Copy of Charge with reference to Defendant Steelworkers charge. (Attached as Exhibits "C" and "D".)

15. On October 24, 1979, Plaintiff, through counsel, forwarded a statement of position to Defendant EEOC concerning Defendant McNulty's charge contending that (1) the "Final Interpretive Guidelines," specifically Question and Answer 21, upon which the charge necessarily was based, were *ultra vires* Title VII and (2) investigation of the charge should be deferred pending resolution of *Kansas Association of Commerce and Industry v. Equal Employment Opportunity Commission*, Civil Action No. 79-4145, currently pending in the United States District Court for the District of Kansas, and which raises, *inter alia*, the identical issue which is the subject of the instant action. (Attached as Exhibit "E".)

16. By letter dated December 20, 1979, Defendant EEOC informed Plaintiff via correspondence that it would not defer the investigation, but that the investigation in fact would continue. (Attached as Exhibit "F".)

IV. *Background of the Commission's "Final Interpretive Guidelines"*

17. Prior to the EEOC's issuance of the "Final Interpretive Guidelines" that are at issue in this matter, the EEOC interpreted Title VII to prohibit discrimination in the hiring or providing of benefits, to applicants or employees because of pregnancy, childbirth or related medical conditions. 29 C.F.R. § 1604 (1972).

18. When certain female employees of General Electric Company were denied disability benefits under their em-

ployer's disability plan while they were absent from work as a result of pregnancy, they brought suit against General Electric alleging sex discrimination in violation of Title VII as interpreted by those prior EEOC guidelines.

19. The United States Supreme Court, in *General Electric v. Gilbert*, 429 U.S. 125, on December 7, 1976 held that General Electric's disability insurance plan which excluded coverage for women with pregnancy-related disabilities did not contravene Title VII because the benefits policy was not gender-related but condition-related. Further, the Supreme Court held that because the plan did not exclude any disability that could be incurred by both men and women, the plan was not discriminatory under Title VII.

20. Following the Supreme Court's holding in *Gilbert*, on October 31, 1976, the Pregnancy Discrimination Act was enacted into law.

21. The primary purpose of the Pregnancy Discrimination Act is to prohibit discrimination with respect to pregnant *employees* and pregnant *applicants for employment*: the Act is not intended to modify existing Title VII principles with respect to spouses and dependents. In achieving the goals of the Act, employers are prohibited from employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions; required to treat pregnant employees the same as other employees on the basis of their ability or inability to work; and required to treat pregnancy, childbirth and related medical conditions the same as other disabling conditions.

22. On March 9, 1979, the EEOC published for comment in the Federal Register, Interim Interpretive Guidelines regarding the Pregnancy Discrimination Act. 44 Fed. Reg. 13278-13281 (March 9, 1979). (Attached as Exhibit "G".)

23. On April 20, 1979 the EEOC adopted its "Final Interpretive Guidelines" concerning the Pregnancy Discrimi-

nation Act, by publication in the Federal Register. 44 Fed. Reg. 23804-23808 (April 20, 1979). (Attached as Exhibit "H".)

24. The EEOC's "Final Interpretive Guidelines" published on April 20, 1979, required compliance with the Guidelines by April 29, 1979.

25. The EEOC's "Final Interpretive Guidelines" are in the form of thirty-seven (37) questions and answers rather than expository form.

26. The Shipyard challenges only two (2) of the thirty-seven (37) "Final Interpretive Guidelines," set forth in Questions and Answers 21 and 22. Plaintiff alleges that such guidelines contravene the intent of Congress; are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

27. Of those challenged, only Question and Answer 21 appeared in the EEOC's Interim Interpretive Guidelines in 44 Fed. Reg. 13278-13281 (March 9, 1979) for comment by the public.

28. The substance of Question and Answer 22 appeared for the first time in the EEOC's "Final Interpretive Guidelines" in 44 Fed. Reg. 23804-23809 (April 20, 1979) with an effective date of April 29, 1979. Therefore, the public was unable to comment to the EEOC on the legality and effect of these particular guidelines.

V. *The Pregnancy Discrimination Act and the Commission's "Final Interpretive Guidelines"*

29. The Pregnancy Discrimination Act amended Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e) *et seq.* by adding a new subsection which reads:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical

conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

30. EEOC's "Final Interpretive Guidelines" that are in dispute are Questions and Answers 21 and 22 which state:

21.Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22.Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouses must be covered at the 50 percent level.

VI. *Cause of Action*

31. The EEOC's "Final Interpretive Guidelines" Questions and Answers 21 and 22 concern the extension of employee benefits and insurance coverage, for pregnancy-related conditions, to the spouses of male employees.

32. Questions and Answers 21 and 22 *require* that if an employer's fringe benefit program covers the medical expenses of spouses of female employees, then it must also cover the pregnancy-related medical expenses of spouses of male employees. If the employer's fringe benefit program covers the medical expenses of spouses of female employees then such fringe benefit program *must* afford the same

level of benefits for the pregnancy-related medical expenses of spouses of male employees.

33. The primary purpose of the Pregnancy Discrimination Act is to prohibit discrimination with regard to the hiring or fringe benefits provided females who are *employees* or *applicants for employment* and are absent from the workplace because of pregnancy, childbirth or a pregnancy-related condition.

34. The Pregnancy Discrimination Act was not intended to apply to the spouses of male employees.

35. The extension of benefits under Questions and Answers 21 and 22 to pregnant spouses of male employees is beyond the intent of the Congress, and is arbitrary, capricious and not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

A. Declare that the Commission's interpretation of the Pregnancy Discrimination Act and Title VII involving Questions and Answers 21 and 22 contravenes the intent of Congress and is *ultra vires* the statute, is arbitrary, capricious and not in accordance with law.

B. Declare that the Commission's interpretation of Questions 21 and 22 represents a taking of Plaintiff's property without just compensation.

C. Permanently enjoin the Commission, its officers, employees, and responsible officials from enforcing "Final Interpretive Guidelines" 21 and 22.

D. Publish a notice in the Federal Register stating that "Final Interpretive Guidelines" 21 and 22 are null and void.

E. Grant such additional relief as this Court may deem just and proper.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

SHANNON T. MASON, JR.

Counsel of Record for
Newport News Shipbuilding
and Dry Dock Company

Shannon T. Mason, Jr.
MASON, GIBSON, COWARDIN
and SPENCER
693 J. Clyde Morris Boulevard
Newport News, VA 23601
(804) 595-7275

Gerald D. Skoning
SEYFARTH, SHAW, FAIRWEATHER
and GERALDSON
55 East Monroe Street
Chicago, IL 60603
(312) 346-8000

Stephen T. Myking
SEYFARTH, SHAW, FAIRWEATHER
and GERALDSON
55 East Monroe Street
Chicago, IL 60603
(312) 346-8000

Dated: _____

Exhibit A

CHARGE OF DISCRIMINATION

(IMPORTANT: This ... is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.)

03779-0098

Equal Employment Opportunity Commission

Jane Yanulky

(804) 340-[illegible]391

3421 Stonehill Street

Virginia Beach, VA 23452

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below.)

Newport News Shipbuilding Corp.

(804) 380-2391

4101 Washington Avenue

Newport News, VA 23607

☐ RACE ☐ COLOR ☒ SEX (Male) ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) 08-20-79

1. I was denied full medical coverage for my wife's hospitalization due to pregnancy on August 20, 1979, while covered under the Company's medical plan. I have been employed at Newport News Shipbuilding Corporation since September 1973. The Company employs over 10,000 people.

2. Upon appeal to the Personnel Director, J. R. Vermeister, I was informed that all claims would be paid in accordance with the existing plan.

   To date, no claims have been paid.

3. I believe I was discriminated against under the Company sponsored medical plan for the following reasons:

   a. Spouses of female employees covered under the plan are out on temporary disabilities are covered 100% of all medical costs.

   b. My wife was hospitalized for pregnancy and although covered under the same medical plan, the Company paid 100% of the prenatal expenses, but has limited payment of the hospital costs to a maximum of $300.00

Exhibit A

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, and year)

7-20-79

RESPONDENT'S COPY

Exhibit B

Equal Employment Opportunity Commission
Norfolk Area Office—Baltimore District
215 East Plume Street
Suite 13
Norfolk, Virginia 23510

The United Steelworkers of America, AFL-CIO-CLC acting on behalf of certain individuals named in the Third Party Certification of Charge attached hereto and by reference a part of this Charge, does hereby file this Charge on their behalf and on behalf of all other individuals similarly effected as an aggrieved class.

Our Charges are based on the following particulars:

1. Respondent Newport News Shipbuilding and Dry Dock Company employs over 10,000 employees at its place of business located in Newport News, Virginia. All individually aggrieved persons and all aggrieved members of the class named in this Charge (hereinafter referred to as "aggrieved class") are employees of Respondent at its facilities in Newport News, Virginia.

2. Respondent maintains a "Hospitalization and Medical-Surgical Plan" (hereinafter referred to as "Respondent's Plan") to pay a major part of the cost of medical and hospital care caused by non-occupational illness or accidents of employees and their dependents.

3. Respondent's Plan provides that dependents of employees are covered at the same time and with the same non-pregnancy related coverage as employees. Non-pregnancy related coverage included (among others):

> "Hospital services and other necessary services while hospitalized up to 100% of the first $750.00, then 80% of the excess up to 120 days."

4. However, maternity benefits under Respondent's Plan are limited to:

> "Up to $500 of the hospital charges . . . .", with additional allowance for hospital costs only if there is a complication of pregnancy.

5. On and at all times since April 29, 1979, dependents of members of the aggrieved class have been denied coverage under Respondent's Plan for hospital services and other necessary services while hospitalized due to pregnancy, childbirth or related causes equal to coverage provided for dependents of members of the aggrieved class should hospitalization have occurred due to causes not related to pregnancy, childbirth or related causes.

6. By said denial of equal benefits for hospitalization for pregnancy, childbirth or related causes, Respondent has violated provisions of the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964.

7. We request that the Respondent be required to:

   A. Cease all discrimination violative of the Pregnancy Discrimination Act in the provisions or the administration of benefits for pregnancy, childbirth or related conditions of its employees or their dependents in the aggrieved class; and

   B. Pay all effected individuals and members of the aggrieved class an amount equal to the difference between the benefits they should have received for pregnancy, childbirth or related conditions existing on or after April 29, 1979 had the Respondent not discriminated in the provisions and administration of Respondents Plan and the

amount in fact provided by Respondent's Plan or plans of benefits for said conditions.

Respectfully submitted by
United Steelworkers of America, AFL-CIO-CLC

/s/ Arnol Manning
ARNOL MANNING
Representative
3301 Washington Avenue
Newport News, Virginia 23607
Phone: (804) 247-5291

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
and JOHN MCNULTY,
Defendants.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COMES NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Plaintiff herein, by its attorneys, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that summary judgment be granted in favor of NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY for the relief requested in the complaint previously filed with this Court. This motion is based upon the following:

1) That the Pregnancy Discrimination Act, Pub. L. 95-555 ("The Pregnancy Discrimination Act") prohibits employers from discriminating against female *employees* or female *applicants for employment* on the basis of pregnancy, childbirth, or other related medical conditions, and includes pregnancy in the list of illnesses covered by an employer's fringe benefit plans.

2) That on April 20, 1979 the Equal Employment Opportunity Commission (the "EEOC") adopted "Final Interpretive Guidelines" concerning the Pregnancy Discrimination Act, by publication in the Federal Register, 44 Fed. Reg. 23804-23808 (April 20, 1979).

3) That the Guidelines set forth in Questions and Answers 21 and 22 extend coverage to persons who are not employees, namely the spouses of male employees.

4) That the EEOC's interpretation of the Pregnancy Discrimination Act as set forth in Questions and An-

swers 21 and 22 contravenes the intent of Congress, is *ultra vires*, arbitrary, capricious, and not in accordance with law.

5) That the EEOC's interpretation of the Pregnancy Discrimination Act as set forth in Questions and Answers 21 and 22 represents a taking of Plaintiff's property without just compensation.

6) That there is no genuine issue as to any material fact and consequently Plaintiff is entitled to summary judgment as a matter of law.

WHEREFORE, Plaintiff NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY prays that summary judgment be entered in its favor.

A Memorandum of Law has been filed in support of this Motion.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

By _____

SHANNON T. MASON

_____

GERALD D. SKONING

_____

STEPHEN T. MYKING

MASON, GIBSON, COWARDIN & SPENCER
693 J. Clyde Morris Blvd.
Newport News, Virginia 23601
804/595-7275

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
312/346-8000

Dated: December 15, 1980

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Defendants.

CROSS MOTION FOR SUMMARY JUDGMENT OF DEFENDANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Comes now the Defendant Equal Employment Opportunity Commission, by and through counsel, and respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of The Equal Employment Opportunity Commission. This motion is based upon principles of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the controlling legislative history set forth in the Defendant Commission's Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment, which was filed on or about December 30, 1980.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOHN H. GOINS
Acting Associate General Counsel
Legal Counsel Division

/s/ Anthony J. De Marco
ANTHONY J. DE MARCO
GLORIA J. LETT
Attorneys for Defendant

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6595

JUSTIN W. WILLIAMS
U.S. Attorney
For the Eastern District
of Virginia
Newport News Division

MICHAEL A. RHINE
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501
(804) 441-6331

DATE:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Defendants.

ANSWER

Comes now the Defendant Equal Employment Opportunity Commission (EEOC) and in answer to the Plaintiff's Complaint responds to the numbered paragraphs as follows:

1. Defendant EEOC admits that it has published Guidelines and Questions and Answers concerning the Pregnancy Discrimination Act, which was enacted as an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Defendant EEOC also admits that Defendants United Steelworkers of America and John McNulty have filed charges with the EEOC alleging that the Plaintiff has violated Title VII. The remainder of the allegations in this paragraph constitutes Plaintiff's characterization of the action rather than averments of fact to which a response is required but, to the extent a response may be deemed necessary, these allegations are denied.

2. Defendant EEOC admits that the Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1974 to specifically include pregnancy, childbirth, or related medical conditions within Title VII's prohibition of discrimination "because of sex" or "on the basis of sex." However, Defendant denies that Title VII and the Pregnancy Discrimination Act extend only to female employees and female applicants for employment.

3. Denied.

4. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent that a response may be deemed necessary, these allegations are denied.

5. Denied.

6. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of these allegations.

7. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of these allegations.

8. With respect to the first sentence of paragraph 8, Defendant EEOC denies that it is an independent agency. Defendant admits the remainder of the allegations in the first sentence, but denies that it is a complete characterization of its functions and responsibilities. With respect to the second sentence, Defendant EEOC admits that it has been empowered, under the Pregnancy Discrimination Act, to prohibit discrimination against employees or applicants for employment on the basis of pregnancy, childbirth or related medical conditions, but denies that the Act extends its protections only to female employees and female applicants for employment.

9. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

10. Admitted upon information and belief.

11. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent that a response may be deemed necessary, these allegations are denied.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Defendant EEOC admits that it informed Plaintiff by letter dated December 20, 1979, that it would not honor Plaintiff's request to postpone further investigative activities.

17. Denied. The relevant EEOC Guidelines on Discrimination because of Sex which were in effect prior to the Supreme Court's decision in *General Electric Co. v. Gilbert* may be found in 29 C.F.R. § 1604.10 (1973).

18. Admitted.

19. Defendant EEOC denies that this paragraph accurately reflects the Supreme Court's holding in *General Electric Co. v. Gilbert.*

20. Defendant EEOC admits that the Pregnancy Discrimination Act was enacted after the Supreme Court's decision in *General Electric Co. v. Gilbert*, but denies that the date of enactment was October 31, 1976.

21. Denied.

22. Defendant EEOC admits that it published Interim Amendments to its Guidelines on Discrimination because of Sex as well as Questions and Answers concerning the Pregnancy Discrimination Act in 44 Fed.Reg. 13278 (March 9, 1979).

23. Defendant EEOC admits that it published final amendments to its Guidelines on Discrimination because of Sex and Questions and Answers concerning the Pregnancy Discrimination Act in 44 Fed.Reg. 23804 (April 20, 1979).

24. Denied.

25. Denied.

26. With respect to the first sentence, Defendant EEOC admits that Plaintiff is challenging two of the 37 Questions and Answers (Numbers 21 and 22) appended to the Guidelines on Discrimination because of Sex. The second sentence contains Plaintiff's characterization of its action rather than averments of fact to which a response is required but, to the extent that a response may be necessary, these allegations are denied.

27. Admitted.

28. Denied.

29. Defendant EEOC admits that the Pregnancy Discrimination Act, in part, added 42 U.S.C. § 2000e(k).

30. Admitted.

31. Denied.

32. Insofar as paragraph 32 states that Questions and Answers 21 and 22 require certain actions by employers, it is denied. In all other respects, it is admitted.

33. Denied.

34. Denied.

35. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent a response may be deemed necessary, these allegations are denied.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim upon which relief can be granted.

2. This Court lacks subject matter jurisdiction over this action.

3. Plaintiff cannot demonstrate that it is entitled to equitable relief in this action.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOHN H. GOINS
Acting Associate General Counsel
Legal Counsel Division

/s/ Barbara L. Neilson
BARBARA L. NEILSON
GLORIA J. LETT

Attorneys for Defendants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 653-5490

JUSTIN W. WILLIAMS
United States Attorney
for the Eastern District
of Virginia

MICHAEL RHINE
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501
(804) 441-6331

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-237-NN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY
c/o Virginia B. Woodson
4101 Washington Avenue
Newport News, Virginia 23607
Defendant.

[Filed Dec. 15, 1980]

COMPLAINT

I. JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. ¶¶ 451, 1343, and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ¶ 2000e, *et seq.*, (hereinafter "Title VII").

2. The unlawful employment practices alleged below were and are now being committed within the Commonwealth of Virginia, and the Eastern Judicial District of Virginia.

II. PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter the "Commission"), is an agency of the United States of America charged with certain litigation authority pursuant to Title VII and is expressly authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. ¶ 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant Newport News Shipbuilding and Dry Dock Company, (hereinafter referred to as "Defendant" or "Company") has been and is now a Virginia Corporation, doing business in the Commonwealth of Virginia and in the City of Newport News, where it is engaged in the business of building and repairing ships, wherein substantial amounts of goods and services cross state lines.

The Defendant has at all times relevant to this lawsuit employed more than fifteen (15) employees.

5. Since at least July 2, 1965, Defendant Newport News Shipbuilding and Dry Dock Company has continuously been and is now an employer engaged in an industry affecting Commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e(b), (g) and (h).

III. STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, persons claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging a violation of Title VII by Defendant Newport News Shipbuilding and Dry Dock Company. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company has intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2(a).

8. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company as part of the compensation of each employee has paid certain hospital and medical expenses for its employees and their dependents under a non-insured plan called "Hospital and Medical Surgical Plan".

9. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company has paid 100% of the hospital charges, including the costs of a semi-private hospital room, for dependent spouses of female employees for 120 days for all conditions, plus 80% of such costs in excess of 120 days.

10. Since at least July 2, 1965, and continuously up until the present time Defendant Newport News Shipbuilding and Dry Dock's Company has refused to pay either 100% or 80% of the hospital expenses when a male employee incurred hospital expenses for his dependent spouse for delivery or other pregnancy-related conditions but rather imposed a limit of $500 on the hospital charges for dependent spouses of male employees for delivery or other pregnancy-related conditions, for which Defendant will pay.

11. By the acts alleged in Paragraphs 9 and 10 above Defendant Newport News Shipbuilding and Dry Dock Company has discriminated, and is discriminating, against its male employees with respect to compensation, terms, conditions and privileges of their employment because of their sex.

IV. PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Newport News Shipbuilding and Dry Dock Company, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with it, from engaging in any employment practices which discriminate because of sex;

B. Order Defendant Newport News Shipbuilding and Dry Dock Company to institute and carry out policies and practices which provide equal compensation, terms, conditions and privileges of employment for its employ-

ees and which eradicate the effects of its past and present unlawful employment practices;

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described herein by providing appropriate monetary relief, with interest, in an amount to be proved at trial and such other affirmative relief as may be necessary to eradicate the effects of its unlawful employment practice;

D. Grant such further relief as the Court deems appropriate; and

E. Award the Commission its costs in this action.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JAMES N. FINNEY
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

/s/ Mollie W. Neal
MOLLIE W. NEAL
Regional Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore District Office
711 W 40th Street, Suite 210
Baltimore, Maryland 21211
(301) 962-3870

/s/ Ruth Weyand
RUTH WEYAND
Special Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

RW/clc

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-237-NN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NEWPORT NEWS SHIPBUILING AND DRY DOCK COMPANY,
Defendant.

MOTION TO DISMISS

NOW COMES NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Plaintiff herein, by its attorneys, and moves this Honorable Court to dismiss the Plaintiff's Complaint under Rule 12(b), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction of the subject matter and that the Plaintiff's Complaint fails to state a claim upon which relief can be granted. In support of this Motion, Defendant states:

1) The Complaint herein is based solely upon an alleged violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, by Defendant;

2) Title VII applies only to individuals with some interest in an employment relationship, either direct or indirect;

3) Plaintiff's Complaint attempts to extend Title VII to individuals with no interest whatsoever in an employment relationship, namely the spouses of male employees;

4) Plaintiff's Complaint therefore does not state a claim for which relief may be granted under Title VII of the Civil Rights Act of 1964, as amended, nor does it confer upon this Court jurisdiction over Defendant under Title VII of the Civil Rights Act of 1964, as amended, or any other federal statute.

WHEREFORE, NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Defendant herein, submits that the Plaintiff's Complaint is wholly lacking in legal merit, that this Court is without jurisdiction and that the entire Complaint should be dismissed with prejudice pursuant to the provisions of Rule 12(b), Federal Rules of Civil Procedure, with the costs of this action awarded to the Defendant, together with such other and further relief as this Court shall deem appropriate.

A Memorandum of Law has been filed in support of this Motion.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY

By /s/ Shannon T. Mason
SHANNON T. MASON

MASON, GIBSON, COWARDIN
& SPENCER
693 J. Clyde Morris Boulevard
Newport News, Virginia 23601
(804) 595-7275

/s/ Gerald D. Skoning
GERALD D. SKONING

/s/ Stephen T. Myking
STEPHEN T. MYKING

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Dated: January 7, 1981

Attachment "A"

APPROVED BY OMB

3---180541 (FC81B
Expires 1-31-81

CHARGE OF DISCRIMINATION

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

CHARGE NUMBER(S) (AGENCY USE ONLY)

EEOC

03780-0434

Equal Employment Opportunity Commission

Dayton E. Yard

HOME TELEPHONE NUMBER (Include Area Code)

(804) 587-0244

8224 Julian Ave.

Norfolk, Va. 23518

NAME OF THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below.)

Newport News Shipbuilding Co.

TELEPHONE NUMBER (Include Area Code)

(804) 380-2268

1880 Washington Ave.

CITY, STATE AND ZIP CODE

Newport News, Va. 23607

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

Female

DATE(S) DISCRIMINATION TOOK PLACE (Earliest and Latest)

March 17, 1980 and Continuing

I. I have been continuously denied my benefits under the medical & Hospitalization plan provided employees and their dependents by Newport News Shipbuilding Corporation. This Company employs approximately 18000 people. I have worked for the company since April 5, 1978.

II. The Company health benefits office continuously refuses to pay the medical expenses for my wife's pregnancy in the same manner it pays for other temporary disabilities.

III. I believe that the Company discriminates against female dependents in pregnancy benefits for the following reasons:

a. My wife delivered her baby on Feb 3, 1980. During the delivery she had complications. The total bill was approximately $2088. to date the insurance has paid only $1150.00.

b. The company limits hospitalization and medical coverage for pregnancy for dependents to a $500 maximum, however for other temporary disabilities the insurance pays 100% of the first $750.00 then 80% of the excess up to 120 days.

c. Male dependants of female employees are covered in the same manner as employees.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

Date 5-14-80

Charging Party Signature

NOTARY - When necessary for State and Local Requirements

Attachment "B"

CHARGE OF DISCRIMINATION

EEOC 03779-0098

Equal Employment Opportunity Commission

John Yardley
3421 Stencil Street
Virginia Beach, VA 23452
(804) 340-0391

NAME OF THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below)

Newport News Shipbuilding Corp.
4101 Washington Avenue
Newport News, VA 23607
(804) 380-2291

☐ RACE ☐ COLOR ☒ SEX (Male) ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) 08-20-79

1. I was denied full medical coverage for my wife's hospitalization due to pregnancy on August 20, 1979, while covered under the Company's medical plan. I have been employed at Newport News Shipbuilding Corporation since September 1973. The Company employs over 10, 000 people.

2. Upon appeal to the Personnel Director, J. R. Vermeister, I was informed that all claims would be paid in accordance with the existing plan.

   To date, no claims have been paid.

3. I believe I was discriminated against under the Company sponsored medical plan for the following reasons:

   a. Spouses of female employees covered under the plan and out on temporary disabilities are covered 100% of all medical costs.

   b. My wife was hospitalized for pregnancy and although covered under the same medical plan, the Company paid 100% of the prenatal expenses, but has limited payment of the hospital costs to a maximum of $300.00

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I declare under penalty of perjury that the foregoing is true and correct.

9-20-79 Date

Charging Party (Signature)

RESPONDENT'S COPY

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE
711 West 40th Street, Room 210
Baltimore, Maryland 21211

Charge No. 037800484

DALTON E. TEED
Norfolk, Virginia
Charging Party

NEWPORT NEWS SHIPBUILDING COMPANY
Newport News, Virginia
Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that Respondent discriminated against him by providing lower medical benefits to him than those provided to female employees.

Examination of the evidence shows the following facts which indicate that there is reasonable cause to believe that the allegation is true:

The Respondent, Newport News Shipbuilding, a Tenneco Company, provides for all eligible employees a Hospitalization and Medical-Surgical Plan for Plant Protection Employees [Plan Identification Number NNS(PN)-508]. The plan was established on February 26, 1951 and is provided by the shipyard through a self-administered hospitalization plan. The employees are not required to con-

tribute to the plan and payment of benefits are made from the Company's operating funds.

With regard to the extent of benefits provided to employees, the Basic Plan provides in part the following to all employees and their eligible dependents:

—full payment of costs for a semi-private hospital room for up to 120 days

—provides 100% of the first $750. of necessary hospital services then 80% of the excess up to 120 days.

The policy further states that maternity benefits for the wife of a male employee will be covered up to a maximum of $500. of the hospital charges and 100% of reasonable and customary charges for delivery and anesthesiology.

Thus, the record shows that female employees receive benefits of 100% of hospital costs for the first 120 days for their male spouses and other eligible dependents while male employees receive a limited benefit in those instances when wives incur hospitalization costs for maternity reasons.

Therefore the Company, by providing greater coverage to female employees than that which is provided to male employees, is thereby sanctioning differential protection for covered employees which is solely gender-based and which has a disparate impact on male employees.

Further, the coverage accorded by the present plan was preceded by a plan which, prior to April 29, 1979, also provided limited coverage to female employees for maternity related hospitalization.

Thus, the record reveals that the present disparate impact on male employees had its genesis in the gender-based distinction accorded to female employees in the past.

The Commission has held that when a company provides less benefits to one class of employee than accorded to another class, and that distinction is gender-based, the policy constitutes unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. A "Notice of Conciliation Process" is attached for your information; a representative of the Commission will contact each party in the near future to begin the conciliation process.

On behalf of the Commission:

/s/ Dorothy E. Mead
DOROTHY E. MEAD
District Director

Date: Oct. 9, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1283

NEWPORT NEWS SHIPBUILDING and DRY DOCK CO.,
Plaintiff-Appellee,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants-Appellant.

No. 81-1307

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff-Appellant,
v.
NEWPORT NEWS SHIPBUILDING and DRY DOCK CO.,
Defendant-Appellee.

Consolidated Appeals from the United States
District Court of the Eastern District
of Virginia

**MOTION OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TO STRIKE, OR IN THE ALTERNATIVE, TO
SUPPLEMENT THE RECORD ON APPEAL**

The Equal Employment Opportunity Commission moves this Court to strike the partial transcript of a hearing held in *EEOC* v. *Lockheed Missiles and Space Programs, Inc.* (N.D. Calif.) filed in this Court on September 29, 1981 by appellee Newport News Shipbuilding & Dry Dock Co. In the alternative, the Commission requests that it be permitted to supplement the record in this case, as the shipyard attempts to do, with other and more relevant

material from the record in *Lockheed*. In support of this motion the Commission states:

1. The partial transcript of the hearing in *Lockheed* has no substantive bearing on this case and is thus irrelevant.

2. The sole reason for the shipyard's inclusion of this transcript is to impart the impression that the Commission has misled the Court in the present case by making errors apparently made by trial counsel in *Lockheed*.

3. Counsel for Commission in this appeal did not in any manner participate in the preparation of the *Lockheed* briefs.

4. The Commission has already acknowledged a typographical omission in its opening brief and fully rectified this mistake in its reply brief.

5. The shipyard's brief was filed on July 2, 1981. The *Lockheed* hearing occurred on June 26, 1981. There is no reason why this transcript, even if relevant, was not submitted with the appellee's brief. Instead, it was submitted on the eve of oral argument. Counsel for the Commission did not receive the transcript until one day after oral argument.

6. Thus, because the transcript is incomplete, irrelevant, and misleading, the Commission requests that it be stricken from the record.

7. In the alternative, the Commission moves to supplement the record with three letters attached to the Commission's Motion for Rehearing in *Lockheed* filed on July 15, 1981.

8. The letters are correspondence prior to the enactment of the Pregnancy Discrimination Act, between Senator Javits; Carin Ann Clauss, Solicitor of Labor; Eleanor Holmes Norton, Chair of the Equal Employment Opportunity Commission; and Drew S. Days III, Assistant Attorney General. They address the precise issue presented in this appeal: whether the PDA requires medical in-

surance coverage for the pregnancy-related expenses of spouses.

9. The letters make clear that it was the opinion of the Department of Justice, the Department of Labor, and the Equal Employment Opportunity Commission that an employer, such as the shipyard, who provides comprehensive health care coverage for dependent spouses must cover pregnancy the same as it covers all other disabilities.

10. The Commission's counsel originally became aware of this correspondence while preparing the reply brief but did not include them at the time because it was thought improper to supplement the record at that late date.

11. Now that the shipyard supplements the record with *Lockheed* documents, the Commission feels it too is entitled to submit additional clarifying material from the *Lockheed* case.

12. *Lockheed* is presently on appeal to the Ninth Circuit.

Respectfully submitted,

CONSTANCE L. DUPRE
Acting General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VELLA M. FINK
Assistant General Counsel

/s/ Melissa Langa
MELISSA LANGA
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6150

October 16, 1981

Attachment A

UNITED STATES SENATE

COMMITTEE ON HUMAN RESOURCES
Washington, D.C. 20510

June 6, 1977

Dear Ms. Norton:

The Senate is now considering S.995, a bill amending Title VII of the Civil Rights Act of 1964 to include pregnancy in the definition of discrimination on the basis of sex. During hearings before the Labor Subcommittee, the Administration testified in support of the disability insurance and employment practices aspects of the bill. An area that was not addressed at the hearings, however is the possible health insurance implications of the bill for maternity and other sex-linked coverages.

It is important that the Committee receive the views of the Administration on this issue. As the Committee has scheduled no further hearings on the bill, a letter communicating your views would be most useful. Specifically, your comments on the following possible interpretations of S.995 as it may affect health insurance fringe benefit programs will be instructive to the Committee.

There are three possible interpretations of what might constitute compliance with the bill in the health insurance area. The narrowest interpretation is premised upon the fact that health insurance is today most commonly offered as a fringe benefit which protects employees from the financial liabilities connected with health care both for themselves and for their families. Thus a female employee who received benefits for her maternity coverage can be equated to a male employee who receives benefits for his wife or daughter's maternity costs. Under this interpretation, so long as maternity benefits are available on the

same basis to both male and female employees, there is no sex descrimination regardless of the scope of coverage or the level of benefit. This is because there is no disparate impact on female employees, at least where family health coverage is assumed.

A second interpretation is to compare the relative comprehensiveness of health insurance coverage for male-linked conditions to that for female-linked conditions such as maternity. Under this interpretation, compliance with Title VII as amended by S.995 will be based on a case-by-case comparison of health insurance coverage for sex-linked conditions; any restrictions that would impact more heavily on female-linked conditions than on male-linked conditions, such as relatively low dollar limitations on maternity benefits, would not be permitted.

A third interpretation is that S.995 requires equality in comprehensiveness of coverage as between male and female employees for conditions only they themselves are subject to, regardless of who else may be insured under the health plan. This approach, while similar to the bill's requirements for disability insurance, raises issues of equal treatment. For example, it may result in a health plan offering maternity benefits to female employees, but not to male employees, even though each employee insures his or her entire family and may pay equal premiums for that coverage.

Other interpretations based upon actuarial equality or equality in premium costs were each employee to purchase a separate health insurance policy are possible. The above discussion should, however, illustrate the broad range of policy choices that are presented by the proposed legislation. Some possible interpretations may require amendments to the text of the bill or may be elaborated in legislative history. In any event, the complexity of the issue is apparent to all who have dealt with it. Accordingly, your recommendations will be most carefully considered.

Finally, a related issue to that of health insurance coverage is the permissible method of compliance. H.R. 6075, parallel legislation to S.995, contains a prohibition against employers lowering existing benefits in order to comply with the bill. As the testimony we received from the Administration did not anticipate this proposal, the Committee likewise needs to know your position on a prohibition on reductions in existing benefits.

Sincerely,

/s/ Jacob K. Javits
JACOB K. JAVITS

Honorable Eleanor Holmes Norton
Chair, Equal Employment Opportunity
Commission
Washington, D.C.

Attachment B

DEPARTMENT OF JUSTICE

Washington, D.C. 20530

June 16, 1977

Honorable Jacob K. Javits
United States Senate
Washington, D.C. 20510

Dear Senator Javits:

This joint letter is in response to your June 6, 1977 letters to Secretary Marshall, Commissioner Norton and Attorney General Bell seeking our comments on certain of the possible effects of S. 995, which would amend Title VII of the Civil Rights Act of 1964, as amended, to prohibit discrimination on the basis of pregnancy related conditions.

In that letter you outlined three possible interpretations of the bill as it may affect health insurance fringe benefit programs. We agree that as presently drafted and in light of the legislative history to this point the bill is ambiguous with respect to health insurance programs and that the intent of the bill should be clarified either through legislative history or by amending the present language.

This potential problem was not addressed in the Administration's testimony on S. 995 and its companion legislation in the House, H.R. 6075. The bill focused, we believed, on the equality of benefits between male and female employees.

We note at the outset that the main thrust of S. 995 is to insure that female workers have the same opportunities to work, be promoted, acquire seniority or have their incomes supplemented in times of disability as male employees similarly capable or incapable of performing the duties of the job.

We offer the following interpretations which we believe would be most in accord with general Title VII principles, in the absence of any specific legislative history or change in language. Because the plain language of the bill mandates that all employees must be treated the same with regard to all terms and conditions of employment, including fringe benefit programs, and provides that discrimination on the basis of pregnancy is discrimination on the basis of sex, we believe that the present language of the bill would prohibit the exclusion of pregnancy coverage from a medical insurance program offered to employees, as well as prohibit any limitation on benefits for pregnancy or related medical conditions unless such limitations are imposed on all other medical conditions. And since medical insurance programs would have to cover medical costs arising out of pregnancy and related conditions for female employees, general Title VII and Equal Pay Act principles would require coverage of similar costs imposed upon male employees by virtue of the pregnancy of their wives.

On the other hand, the basic principles of Title VII would also be satisfied if medical insurance programs treated female employees and the wives of male employees equally with respect to pregnancy benefits. For while only a woman can be disabled by pregnancy, the medical *costs* of pregnancy may be borne alike by men and women. If you seek to achieve this result, however, it would be highly desirable to clarify this matter through a language change or through clear legislative history.

In your letter you also asked for our position on a provision that is contained in H.R. 6075 which provides for an effective date and prohibits employers from lowering existing benefits in order to comply with the bill. We agree that the clarification of an effective date is desirable to avoid confusion and arbitrary results.

We believe that the prohibition against lowering of benefits is desirable for a short period of time so that em-

ployees will not be deprived of existing benefits. However, we recognize that these plans must be flexible and it is our view that Title VII permits such flexibility. The main thrust of Title VII is equal treatment and requires only that an employer not act to the disadvantage of any protected group. However, there is a similar provision in the Equal Pay Act which prohibits the lowering of wages to comply with that Act.

We hope our comments have been of assistance to you in reaching a final decision on the matters we discussed. Please let us know if there is anything further we can do to assist in the preparation of this essential legislation.

Sincerely,

/s/ Eleanor Holmes Norton
ELEANOR HOLMES NORTON
Chair, Equal Opportunity Commission

/s/ Carin Ann Clauss
CARIN ANN CLAUSS
Solicitor of Labor

/s/ Drew S. Days III
DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR
Washington, D.C. 20210

[SEAL]

Jun. 28, 1977

Honorable Jacob K. Javits
United States Senate
Washington, D.C. 20510

Dear Senator Javits:

The purpose of this letter is to further clarify our letter of June 16 which was sent in response to various questions you asked concerning certain of the possible effects of S. 995. We understand that there is some confusion as to the meaning of the last sentence of the second full paragraph on page 2 of our letter. That sentence, which expressed our view that the additional medical insurance required by the bill for female employees would be required for the wives of male employees, is only applicable where the employer maintains an otherwise comprehensive health insurance plan covering both employees and their dependents. It would not apply where the employer offers health insurance to employees only. In those circumstances, it would not be necessary to cover the medical costs of a dependent wife's pregnancy.

We might also point out that this precise issue has never been adjudicated and that our statement simply reflects our view as to what the bill would require.

In addition, it has come to our attention that the first two paragraphs on page 3 of our letter may be misunderstood as suggesting that it is permissible to reduce benefits in order to remedy violations of Title VII.

The Courts and the Equal Employment Opportunity Commission have held that after a finding of discrimination under Title VII, the employer must afford the vic-

tims of discrimination the benefits which have previously been denied them. Reducing the benefits to the previously favored groups does not constitute an adequate remedy to the victims of discrimination. Rather, the Title VII remedy must include the raising of benefits of those discriminated against so that they are treated as well as those previously favored. (See *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) and *Manhart* v. *City of Los Angeles Department of Water and Power* —— F.2d —— (9th Cir. 1976) 13 FEP Cases 1625; Reh Den; 14 FEP Cases 1233). The principle that the victims of discrimination must be "made whole" for the losses which they have suffered has been articulated by the Supreme Court. (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).)

Sincerely,

/s/ Eleanor Holmes Norton
ELEANOR HOLMES NORTON
Chair, Equal Employment
Opportunity Commission

/s/ Carin Ann Clauss
Carin Ann Clauss
Solicitor of Labor

/s/ James P. Turner
JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

CERTIFICATE OF SERVICE

I certify that the motion has been mailed this day, postage prepaid, to the following counsel of record:

Stephen T. Myking, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, Ill. 60603

Shannon T. Mason, Jr. Esq.
Mason, Gibson, Cowardin & Spencer
693 J. Clyde Morris Blvd.
Newport, News, VA 23602

Richard J. Brean, Esq.
Carl B. Frankel, Esq.
Five Gateway Center
Pittsburgh, PA 15222

C.T. Neale, III, Esq.
Hudgins & Neale
10352 Warwick Blvd.
Newport News, VA 23601

/s/ Melissa Langa
MELISSA LANGA
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6150

October 16, 1981

[THIS PAGE INTENTIONALLY LEFT BLANK]

Office - Supreme Court, U.S.
FILED
NOV 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-411

In the Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL N. MARTINEZ
Acting General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether a company discriminates against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing an employee health insurance plan that offers less coverage for pregnancies of spouses than for their other medical expenses.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Baltimore & O. C. T. R.R. v. *United States*, 583 F.2d 678, cert. denied, 440 U.S. 968 12

Chastang v. *Flynn & Emrich Co.*, 541 F.2d 1040 6

EEOC v. *ARA Manufacturing Co.*, No. CA3-81-0406-F (N.D. Tex. filed Aug. 18, 1982), appeal docketed, No. 82-1549 (5th Cir. Oct. 19, 1982) 5

EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 12

EEOC v. *Atlanta Gas Light Co.*, No. C81-1090A (N.D. Ga. filed Aug. 17, 1982), appeal docketed, No. 82-8646 (11th Cir. Oct. 8, 1982) 5

EEOC v. *Colby College*, 589 F.2d 1139 6

EEOC v. *Fruehauf Corp.*, No. 82-71299 (E.D. Mich. filed Apr. 9, 1982) 5

EEOC v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 ..... 5, 6

Page

Cases—Continued:

EEOC v. *St. Regis Paper Co.*, No. 8-82-1351 (S.D. Tex. filed May 14, 1982) 5

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 12

Faraca v. *Clements*, 506 F.2d 956, cert. denied, 422 U.S. 1006 6

FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 11

Fitzpatrick v. *Bitzer*, 519 F.2d 559, rev'd, 427 U.S. 445 6

General Electric Co. v. *Gilbert*, 429 U.S. 125 ..... 1-2, 3, 5, 8, 14

Kansas Association of Commerce and Industry v. *EEOC*, No. 79-4145 (D. Kan. filed Aug. 2, 1979) 5

Los Angeles Department of Water and Power v. *Manhart*, 435 U.S. 702 6

McDonald v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 ..... 6, 8, 10

Miller v. *Youakim*, 440 U.S. 125 12

North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 11

Power Reactor Co. v. *International Union of Electrical Workers*, 367 U.S. 396 12

Rosen v. *Public Service Electric & Gas Co.*, 477 F.2d 90 6

Page

Cases—Continued:

Udall v. *Tallman*, 380 U.S. 1 12

Wambheim v. *J.C. Penney, Co.*, 642 F.2d 362 6

Zuber v. *Allen*, 396 U.S. 168 12

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e (& Supp. IV) *et seq.* :

Section 701(k), 42 U.S.C. (Supp. IV) 2000e(k) 2, 10
Section 703(a), 42 U.S.C. 2000(a) 9
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) 7
Section 706, 42 U.S.C. 2000e-5 3

42 U.S.C. 1981 8

Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 1

Miscellaneous:

123 Cong. Rec. (1977):

p. 22188 13

p. 29642 11

pp. 29650-29652 12

p. 29663 11

Page

Miscellaneous—Continued:

Discrimination on the Basis of Pregnancy 1977: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 11, 12

44 Fed. Reg. 23804 (1979), codified at 29 C.F.R. 1604 & App. 2

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) 10, 11

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 11, 12

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 8, 10, 11, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The judgment of the en banc court of appeals (Pet. App. 22a-23a) is reported at 682 F.2d 113. The amended opinion and order of the district court (Pet. App. 9a-20a) is reported at 550 F. Supp. 66.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1982. The amended opinion and order of the district court was filed February 25, 1981. The petition for a writ of certiorari was filed on September 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076, in response to this Court's decision in *General Electric Co.* v.

Gilbert, 429 U.S. 125 (1976), which held that pregnancy-related classifications did not, on their face, constitute sex-based classifications under Title VII. The PDA amended the "Definitions" section of the Title (Section 701) to add subsection (k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions * * *." (42 U.S.C. (Supp. IV) 2000e(k)).[1]

Within seven months after the PDA's passage, the Equal Employment Opportunity Commission revised its Guidelines on Discrimination Because of Sex to reflect changes required by the Act. The final Guidelines, and an Appendix of 37 Questions and Answers, were published on April 20, 1979. 44 Fed. Reg. 23804, codified at 29 C.F.R. 1604 & App. The Answers to Questions 21 and 22 set forth the Commission's position that Title VII, as amended by the PDA, requires that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions" (Pet. 5-6).[2]

2. In September 1979 John McNulty, an employee of petitioner, filed an EEOC charge alleging that the company had unlawfully discriminated against him by refusing to provide full insurance coverage for his wife's hospitalization due to pregnancy. One month later, a similar charge was filed on behalf of petitioner's male production and maintenance employees by the United Steelworkers of America, their collective bargaining representative.

---

[1]The complete text of the new definition appears at Pet. 2-3.

[2]The guidelines also make clear that an employer is not obliged to provide the same level of health insurance coverage for pregnancy-related expenses of the spouses of male employees as it provides for its female employees. *Ibid.*

Petitioner's hospitalization and medical-surgical health insurance plan extends coverage to employees, their spouses, and unmarried children (Pet. App. 29a-30a). The plan pays in full for a semi-private hospital room for up to 120 days, and for all covered hospital services up to $750, and 80% of the excess up to 120 days (Pet. App. 31a-32a). A dependent's illness or injury is covered to the same extent as an employee's illness or injury, except that a dependent's pregnancy-related expenses are reimbursed only for up to $500 of the hospital charges (Pet. App. 37a).

3. Before the EEOC had acted on the McNulty and Steelworkers charges, petitioner filed suit on January 30, 1980 against the Commission and the charging parties, seeking a declaratory judgment that the statutory interpretation contained in the Commission's Answers to Questions 21 and 22 in the Guidelines was incorrect, and requesting that the court permanently enjoin EEOC from enforcing that interpretation (C.A. App. 6, 14). After the Commission completed processing of McNulty's charge, it filed an enforcement suit against petitioner on December 15, 1980, under Section 706 of Title VII, 42 U.S.C. 2000e-5.

Before discovery commenced in the Commission's Title VII enforcement suit, the district court, on cross motions for summary judgment, ruled in favor of petitioner in its declaratory judgment action (Pet. App. 9a-20a). Based on that ruling, the court dismissed the EEOC's complaint in the Title VII action for failure to state a claim upon which relief could be granted (Pet. App. 2la). Relying on *General Electric Co.* v. *Gilbert, supra,* the court held that petitioner's restriction on coverage for a spouse's pregnancy-related expenses "does not constitute gender-based discrimination" on its face and was not shown to have "caused any gender-based effect" in violation of Title VII (Pet. App. 16a-17a). The court recognized that the PDA was enacted in response to *Gilbert's* holding that pregnancy classifications are not,

on their face, sex-based classifications, but it concluded that the Act "carved out a narrow exception" to *Gilbert* that applied only to claims of pregnancy discrimination submitted by women employees or applicants for employment (Pet. App. 14a-16a).

4. A divided panel of the court of appeals, having consolidated the cases, reversed (Pet. App. 2a-8a). The panel rejected the view that the PDA's clarification of Title VII's definition of sex discrimination applied only to discrimination against female employees. Analyzing the PDA's language, the panel explained (Pet. App. 5a-6a):

> The first clause of the subsection provides that the terms "because of sex" and "on the basis of sex" include because of, or on the basis of, pregnancy, childbirth and related medical conditions. By statutory definition those disabilities are within the meaning of the word "sex." There is nothing in the first clause to suggest that the definition will vary depending upon the employment status of the pregnant woman. The second clause reads quite harmoniously with the first, since coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected"; it does not say "as other *employees* not so affected."

Turning to the legislative history, the panel noted that Senators Bayh and Cranston stated that Title VII, as amended by the PDA, would require complete coverage for the wives of male employees, including pregnancy-related expenses, if complete coverage is provided for the husbands

of women workers (Pet. App. 6a). Recognizing that the Senate Committee apparently "thought the question an open one," the panel found that fact to provide "no platform for the company's contention that the question should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act" (Pet. App. 7a), i.e., under the principles of *General Electric Co.* v. *Gilbert, supra.* Rather, the panel stated, "[u]pon enactment, the new subsection became an integral part of Title VII" and it established, for the purpose of subsequent litigation, that all "[d]istinctions based on pregnancy * * * are distinctions based on sex" (Pet. App. 7a). The panel concluded (*ibid.*):

> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

On rehearing en banc, a majority of the court upheld the panel's ruling for the reasons set forth in the panel's opinion (Pet. App. la).

ARGUMENT

1. Petitioner correctly asserts that the decision below conflicts with that of the Ninth Circuit in *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (1982), that the issue is a significant and recurring one;[3] and that a uniform

---

[3]See cases cited at Pet. 14, n. 13. See also *EEOC* v. *Atlanta Gas Light Co.*, No. C81-1090A (N.D. Ga. filed Aug. 17, 1982), appeal docketed, No. 82-8646 (11th Cir. Oct. 8, 1982); *EEOC* v. *St. Regis Paper Co.*, No. 8-82-1351 (S.D. Tex. filed May 14, 1982); *EEOC* v. *Fruehauf Corp.*, No. 82-71299 (E.D. Mich. filed Apr. 9, 1982); *Kansas Association of Commerce and Industry* v. *EEOC*, No. 79-4145 (D. Kan. filed Aug. 2, 1979); *EEOC* v. *ARA Manufacturing Co.*, No. CA3-81-0406-F (N.D. Tex. filed Aug. 18, 1982), appeal docketed, No. 82-1549 (5th Cir. Oct. 19, 1982).

national rule is important (Pet. 13-15). For those reasons, we agree that this Court should grant plenary review in this case.[4]

2. The Commission does, however, submit that the court of appeals was correct in holding that under Title VII, as amended by the PDA, an employer unlawfully discriminates against its male workers by providing a medical insurance plan that covers spouses' maternity costs less favorably than costs resulting from all other spousal illnesses or injuries. The PDA added one paragraph to Title VII's "Definitions" section, indicating that the statute's terms "because of sex" or "on the basis of sex" include distinctions relating to pregnancy. As the court of appeals recognized, the question here is whether that definition applies only to claims of pregnancy-based discrimination submitted by women workers, or whether it applies across-the-board to all Title VII claims involving pregnancy, submitted by men as well as women. The court of appeals properly adopted the latter construction.

a. It is well-settled that Title VII prohibits discrimination in fringe benefits[5] against male as well as female employees.[6]

---

[4]The Solicitor General has also authorized the filing of a petition for certiorari in *Lockheed, supra,* which will suggest holding that case pending disposition of this one.

[5]Insurance coverage for spouses is a fringe benefit protected by the Act. *Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 709 n.14 (1978); *Wambheim* v. *J.C. Penney Co.,* 642 F.2d 362 (9th Cir. 1981).

[6]See, *e.g., EEOC* v. *Colby College,* 589 F.2d 1139 (1st Cir. 1978) (life insurance benefits); *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (2d Cir. 1975), rev'd for failure to award back pay, 427 U.S. 445 (1976) (retirement benefits); *Chastang* v. *Flynn & Emrich Co.,* 541 F.2d 1040 (4th Cir. 1976) (same); *Rosen* v. *Public Service Electric & Gas Co.,* 477 F.2d 90 (3d Cir. 1973) (same). Cf. *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 280 (1976) (white employee may allege race discrimination); *Faraca* v. *Clements,* 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975) (white male may claim race discrimination when employment was denied because his wife was black).

Of course, a distinction based on the sex of a spouse discriminates among employees on the basis of sex because the spouse's sex defines the employee's sex: a plan that denies full coverage for female spouses only, because of their sex, necessarily denies employment benefits to male employees by virtue of *their* sex. Thus, a health insurance plan provided by an employer for his workers and their families which limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female conterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is therefore provided a smaller compensation package than his female co-worker. This practice on its face violates Section 703(a)(l) of the Act, 42 U.S.C. 2000e-2(a)(l), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's * * * sex."

Petitioner's plan, of course, does not deny full coverage to employees' wives expressly because they are women. However, because it restricts coverage on the basis of a spouse's pregnancy, it is no more lawful than a plan that restricts coverage on the basis of a spouse's sex if, as the court of appeals held, the PDA establishes for all Title VII purposes that pregnancy-based distinctions are sex-based distinctions. The plain language of the PDA, as well as its legislative history, fully support that holding.

b. The text of the PDA is comprised of two clauses. The first states that Title VII's terms "because of sex" or "on the basis of sex" include "because of or on the basis of pregnancy"; the second states that "women affected by pregnancy * * * shall be treated the same for all employment-related purposes * * * as persons similar in their ability or

inability to work."[7] The Act on its face thus supplies a definition to be used in the analysis of any individual's claim, male or female. While the PDA makes clear that under Title VII women affected by pregnancy shall not be treated differently in benefit plans from other similarly situated persons, it nowhere limits its scope to pregnancies of employees as distinguished from those of spouses.[8]

c. Our construction of the Act is consistent with the policy and structure of Title VII itself. As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, women and men, the right to be free of discriminatory treatment in the work place. It prohibits the employment of women, or men, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of men, or women, on the basis of their sex.

To this broad, remedial law, the PDA adds a one-paragraph definition. Petitioner's contention that that definition applies only to claims of women workers does not

---

[7]The second clause effectuates Congress's intent to overrule the underlying rationale of *Gilbert* "that employers may treat pregnancy and its incidents as *sui generis* without regard to it functional comparability to other conditions." S. Rep. No. 95-331, 95th Cong., lst Sess. 4 (1977).

[8]The argument that the comparsion to "ability or inability to work" in the second clause limits the PDA's scope to claims of female workers resembles the argument rejected by this Court in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). The Court held that 42 U.S.C. 1981 protects whites against racial discrimination because the statute's comparison to rights "enjoyed by white citizens" simply "emphasiz(ed) the racial character of the rights being protected" and did not restrict the statute's protection to non-whites. 427 U.S. at 287. Here, the comparison emphasizes the functional basis of the conditions to be covered.

comport with the fundamental, anti-discrimination principles upon which Title VII is founded. As this case demonstrates, men as well as women workers may be disadvantaged by employers' policies or programs that treat pregnancy less favorably than other medical conditions or disabilities. If the PDA extends protection from such pregnancy-based discrimination to women employees, while withholding the same protection from their male colleagues, Congress, in a simple definitional amendment to Title VII, has mandated special, preferential treatment contrary to the basic principles of the underlying law.

Moreover, petitioner's construction of the PDA is inconsistent with the structure of Title VII as amended. Under petitioner's view, the Act revises the meaning of Title VII's term "because of * * * sex," contained in Section 703(a), only when that section is invoked by women workers. Had Congress intended the definition of sex discrimination to subsume pregnancy discrimination *only* as to claims of women workers, it would scarcely have sought to achieve that purpose by amending Title VII's "Definitions" section, which defines the terms used "for the purposes of this title"—i.e., for use across-the-board to the analysis of all claims arising under it.

Thus, the language of the PDA and the purpose and structure of Title VII plainly indicate that all Title VII discrimination among employees resulting from different treatment of pregnancy-related conditions is prohibited by the amended Title VII, including discrimination against male employees resulting from denial of health insurance benefits for their wives' pregnancies.

d. The legislative history of the PDA confirms that this interpretation of the Act is correct. The committee reports explained that the PDA embodies the *Gilbert* dissenters' "commonsense view" that pregnancy distinctions are sex

distinctions and is intended to "make plain that, under Title VII * * * discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex." S. Rep. No. 95-331, *supra*, at 3-4; see also H. R. Rep. No. 95-948, 95th Cong., 2d Sess. 1-2 (1978).[9]

While the legislative materials show that Congress understandably focused on the effects of pregnancy-related discrimination on women workers,[10] two sponsors of the legislation— Senators Bayh and Cranston—discussed the specific question presented here: whether denial of spousal benefits for pregnancy unlawfully discriminates against male employees.[11] As the court of appeals noted (Pet.

---

[9]Petitioner cites (Pet. 20), out of context, sentences in the Senate and House Reports to support its restrictive interpretation of the Act. Those sentences, indicating that the PDA "would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work", appear in paragraphs emphasizing that, as applied to women workers, the Act does not confer special benefits but "prohibits only discriminatory treatment." S. Rep. No. 95-331, *supra*, at 4, H.R. Rep. No. 95-948, *supra*, at 4. As we have noted, to apply the definition of Section 701(k) only to female employees would turn the PDA into precisely such a special protection statute solely for women workers, contrary to Congress's intent.

[10]Contrary to petitioner's claim (Pet. 19-20 & n. 19), such remarks showing Congress's special solicitude for women workers cannot, standing alone, support an interpretation of Section 701(k) that reads into the subsection a narrowing of the otherwise established principle that men are also protected by Title VII. Otherwise, the numerous statements in previous Title VII legislative history which voice concern over the protection of blacks, minorities, and women could also be read as establishing that whites and men are not protected by Title VII. This Court has squarely rejected such reasoning. See, e.g., *McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*, 427 U.S. at 280.

[11]Petitioner's assertion that the PDA's principal Senate sponsor, Senator Williams, "assured Congress that his bill did not cover employees' dependents" (Pet. 24) misreads his colloquy with Senator Hatch, which related solely to receiving income maintenance or disability benefits during work absences occasioned by pregnancy. In that context, Senator Williams asserted that only women employees who are

App. 6a), both expressed the view that Title VII as amended by the PDA would require equal coverage of such medical expenses for wives of male employees where coverage is provided for husbands of female employees. 123 Cong. Rec. 29642 (1977) (remarks of Senator Bayh); *id.* at 29663 (remarks of Senator Cranston). Such floor statements by the sponsors of the legislation are entitled to great weight. *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). See also *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearing on H. R. 5055 and H. R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 120-121 (1977) ("*House Hearings*") (testimony of Richard Minck, American Council of Life Insurance).[12]

---

themselves pregnant are within the meaning of the phrase "women affected by pregnancy" (see Pet. 24-25 n. 25). Of course, income maintenance plans protect against wage loss and therefore necessarily apply only to employees. On the other hand, medical benefit or health insurance plans—which Senator Williams did not address—reimburse an employee for medical costs related to a disability and may cover employees only or, as here, spouses and other dependents. Congress was well aware of the difference between disability insurance and medical insurance. See, e.g., S. Rep. No. 95-331, *supra*, at 4-5; H. R. Rep. No. 95-948, *supra*, at 5-6.

[12]In presenting figures on estimated costs, the American Council of Life Insurance in both the Senate and the House based its estimate for the cost of medical benefits on estimates of births to all women in the population, because the bill was read as requiring employers to provide medical coverage for deliveries of dependents of male employees. See *Discrimination on the Basis of Pregnancy 1977: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 369, 402, 424, 431 (1977) ("*Senate Hearings*"); *House Hearings*, *supra*, at 94, 97-98, 101-05. The ACLI's cost figures

Moreover, the Commission informed Congress while the PDA was under consideration that Title VII as amended by the Act would prohibit the practice at issue here.[13] These views were contained in letters signed jointly by the Chairman of the EEOC, the Solicitor of Labor, and the Assistant Attorney General for the Civil Rights Division of the Department of Justice in response to an inquiry by Senator Javits, the ranking Republican member of the Senate Committee on Labor and Human Resources to which the Pregnancy Discrimination Bill, S. 995, was referred.[14] The

---

were presented and discussed during the Senate debate on the bill, 123 Cong. Rec. 29650-29652 (1977) (remarks of Senator Hatch).

Similarly, the Department of Labor estimated the health insurance cost impact of the PDA based on expected births in the population, not merely births to female employees. *Senate Hearings, supra,* at 563-564, *House Hearings, supra,* at 181-182.

[13]The EEOC is the agency charged by Congress with the administration of the PDA. As such, its contemporaneous and consistent construction of the Act, in the guidelines issued within seven months after its passage (see *supra,* page 2), is entitled to great weight. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Generally, to sustain an agency's interpretation of the statute for which it is responsible, a court "need not find that (the agency's) construction is the only reasonable one, or even that it is the result (the court) would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) (citation omitted). Rather, that interpretation must be sustained absent "compelling indications that it is wrong." *Miller* v. *Youakim,* 440 U.S. 125, 144-145 n. 25 (1979); *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973).

Judicial deference is particularly appropriate where, as here, the EEOC informed Congress of the agency's construction of the proposed statute while it was still under legislative consideration. See *Zuber* v. *Allen,* 396 U.S. 168, 192-193 (1969); *Power Reactor Co.* v. *International Union of Electrical Workers,* 367 U.S. 396, 409 (1961); *Baltimore & O. C. T. R.R.* v. *United States,* 583 F.2d 678, 684 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979).

[14]Copies of the correspondence have been lodged with the Clerk of this Court. It was admitted into the record below by order of the court dated January 7, 1982.

Senate Committee issued its Report more than a week after the date of the Commission's last letter.[15] Surely, if Congress intended to limit the PDA to claims of women workers, it would have stated that the administrative interpretation exceeded the Act's reach. It did not do so. Instead, the Senate Report states with respect to the PDA's impact on dependent medical insurance coverage that, while the bill's basic purpose (not its sole purpose) is to protect women employees, the bill "clarifies the definition of sex discrimination" not just for the benefit of women employees but for all "Title VII purposes." Questions regarding dependent coverage and, in particular, spousal coverage were left open by the Committee for resolution by the EEOC and the courts, which were to apply this newly clarified definition of sex discrimination in accordance with "existing Title VII principles."[16]

---

[15]Senator Javits' letter was dated June 6, 1977. The government responded in letters dated June 16 and June 28, 1977. The Report was issued on July 6, 1977. S. Rep. No. 95-331, *supra*, at 2; 123 Cong. Rec. 22188 (1977).

[16]The Report provides in relevant part (S. Rep. No. 95-331, *supra*, at 5-6):

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees; it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.
>
> • • • • •
>
> It was suggested before this committee that an effect of Title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This

Clearly, the "existing Title VII principles" to which the Report refers are the substantive precepts relevant to this issue, viz., that men as well as women are protected under the statute from treatment in the work place which is less favorable than that accorded the opposite sex; that dependent health coverage is a benefit which flows to the wage earner; and that a health insurance plan which limits the extent of dependent coverage because of the sex of the employee is unlawful. See *supra*, pages 6-7. It is these principles, together with Title VII's newly clarified definition of sex discrimination, which render petitioner's plan unlawful.[17] The court of appeals was correct in so holding and, should this Court grant the instant petition, its judgment should be affirmed.

---

bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

On the other hand, the question of whether an employer who does cover dependents, either with or without additional costs to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

[17]Petitioner's insistence (Pet. 24) that the "existing Title VII principles" to which the Report refers are embodied in *General Electric Co.* v. *Gilbert*, *supra*, is untenable. If petitioner were correct, the validity of plans of the sort the Report states the committee "certainly [did] not * * * desire to encourage" (S. Rep. No. 95-331, *supra*, at 6) would be virtually beyond dispute. *Gilbert* held that the exclusion of pregnancy from a benefits program is not sexually discriminatory absent a showing of disparate impact in the actuarial value of the benefit packages. Since such a showing would usually be very difficult to make, any

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

MICHAEL N. MARTINEZ
Acting General Counsel
Equal Employment Opportunity Commission

NOVEMBER 1982

---

challenge to the exclusion of spousal pregnancy coverage from an employer's insurance plan, as a practical matter, would be doomed to failure under *Gilbert*. The Senate Report viewed the lawfulness of such plans to be an open, litigable issue, however, and thus could not have intended *Gilbert* to be viable precedent "in the future," i.e., after passage of the PDA.

DOJ-1982-11

Office-Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
and DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEPHEN A. BOKAT
Counsel of Record

CYNTHIA WICKER
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

Attorneys for *amicus curiae*
Chamber of Commerce of
the United States

PARRICK PRESS, WASHINGTON—1051 N. OAK STREET, ARLINGTON, VA 22209—(703) 525-6000

TABLE OF CONTENTS

	Page
Statement of Interest	1
Reasons for Granting the Writ	3
I. The Conflicting Appellate Court Opinions On This Question Place Employers In A Difficult Quandry	3
II. The Decision Of The Fourth Circuit Is Inconsistent With The Legislative History Of The Pregnancy Discrimination Act	4
III. The Majority Opinion Misconstrued The Language Of The Statute	11
Conclusion	13
Exhibit 1	1a
Exhibit 2	3a
Exhibit 3	5a

TABLE OF AUTHORITIES

	Page
CASES	
EEOC v. *Emerson Electric Co.*, 539 F. Supp. 153 (E.D.Mo. 1982), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982)	4,9,10
EEOC v. *Joslyn Mfg. & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1134 (7th Cir. April 14, 1982)	4
EEOC v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982)	3,4,10
Geduldig v. *Aiello*, 417 U.S. 484 (1974)	10
General Electric v. *Gilbert*, 429 U.S. 125 (1976)	5,10
Kansas Association of Commerce & Industry v. *EEOC*, No. 79-4145 (D.Kansas) (cross motions for summary judgment pending)	2,3
NLRB v. *Fruit and Vegetable Packers and Warehousemen*, 377 U.S. 58 (1964)	6
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1950)	6
United Teachers-Los Angeles v. *Board of Education*, 29 Empl. Prac. Dec. ¶32, 759, *appeal docketed* No. 82-5360 (9th Cir. March 12, 1982)	4
Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967)	6
STATUTES	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq.	1, *passim*
Pregnancy Discrimination Act, P.L. No. 95-555, 92 Stat. 2076 (October 31, 1978)	4, *passim*

	Page
LEGISLATIVE MATERIAL	
Pregnancy Discrimination Act Committee Print, June 1980	5,6,7, 8,9,10, 11,12
S. Rep. No. 331, 95th Cong., 1st Sess. July 6, 1977	4,5
MISCELLANEOUS	
Alexander & Alexander Annual Report for 1980	3
EEOC's Guidelines on Sex Discrimination, 29 C.F.R. § 1604.10(b) (1981)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING
and DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. One of its principle functions is to serve as a spokesman for its members before this Court, as well as the lower federal courts and regulatory agencies. In this regard the Chamber often files briefs in support of petitions for

[1] Pursuant to Supreme Court Rule 36.1, this brief is filed with the written consent of the parties to this action.

writs of certiorari.[2] At present the Chamber's membership exceeds 250,000, including over 240,000 corporations, partnerships, proprietorships and individuals, as well as 1,350 trade associations, and 2,700 local and state chambers of commerce.

The Chamber has advocated its members' views on the issue presented in this case since the adoption of the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Guidelines on Sex Discrimination, 29 C.F.R. §1604.10(b)(1981). Indeed, the National Chamber Litigation Center, Inc., the Chamber's litigation affiliate, is representing the plaintiff in the first case filed in federal district court challenging the guidelines at issue here, as well as several others.[3] The Chamber also filed briefs *amicus curiae* in this matter before the United States Court of Appeals for the Fourth Circuit, both before the panel and before the *en banc* court.

The issue presented here, whether the EEOC exceeded its statutory authority in promulgating guidelines which mandate that all employers subject to Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, provide pregnancy insurance for spouses of employees when other spousal coverage is provided, is of substantial importance to an overwhelming majority of the Chamber's members.[4] As a letter from one member indicates, the cost for a single company to comply with these guidelines can exceed $450,000. (*See* Exhibit 1 to this brief.) Despite these tremendous costs, the EEOC has stated that no consideration was given to the economic impact of these regulations. (*See* Exhibit 2.)

---

[2] *See e.g., Metropolitan Edison Company, et al.* v. *People Against Nuclear Energy, et al.*, (Nos. 81-2399, 82-358 July 1, 1982) (Petitions pending); *First National Maintenance Corp.* v. *NLRB*, 449 U.S. 1076 (1981); *Northwest Airlines* v. *Transport Workers of America, AFL-CIO, et al.*, 447 U.S. 920 (1980); *Rockwell International Corp.* v. *City of New York, et al.*, No. 81-904, ____U.S.____, 102 S.Ct. 1038 (Jan. 11, 1982); *Weyerhaeuser Company, et al.* v. *Lyman Lamb Co., et al.*, Nos. 81-1618, 81-1619, ____U.S.____, 102 S.Ct. 2232 (May 17, 1982).

[3] *Kansas Association of Commerce & Industry* v. *EEOC*, No. 79-4145 (D. Kansas)(cross motions for summary judgement pending).

[4] Title VII applies to all employers of 15 or more persons.

Further, as the affidavit from Charles Ginsberg of Alexander and Alexander, Inc.[5] attests, it was common practice prior to promulgation of the guidelines, for employers to place limitations on dependants' pregnancy benefits. (*See* Exhibit 3.) (The original copies of Exhibits 1,2 and 3 are lodged with the United States District Court for the District of Kansas in *Kansas Association of Commerce and Industry* v. *EEOC, supra* at footnote 3.) Thus the challenged guidelines mandate substantial changes in the health insurance policies of many Chamber members.

For all of these reasons, the Chamber respectfully files this brief.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICTING APPELLATE COURT OPINIONS ON THIS QUESTION PLACE EMPLOYERS IN A DIFFICULT QUANDRY.

The issue presented here, whether the EEOC exceeded its statutory authority in promulgating guidelines which mandate that all employers subject to Title VII (those with 15 or more employees) provide medical insurance for the pregnancies of the spouses of employees equivalent to the medical insurance provided for non-pregnancy conditions, is of significance to most employers in the United States. As a result of the decision below in the U.S. Court of Appeals for the Fourth Circuit, which directly conflicts with an opinion of the U.S. Court of Appeals for the Ninth Circuit in *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), employers are placed in a difficult quandry when structuring benefit packages for their employees.

---

[5] "Alexander and Alexander, the second largest international insurance brokerage firm, provides through its 7,200 employees, a broad range of risk management and financial services to businesses of all kinds and all sizes. It plans, places and services all types of insurance programs . . ." Alexander and Alexander Annual Report for 1980, inside front cover.

As we have noted above, it is quite common for employees to have limitations on the medical benefits for spouses' pregnancies, such as those imposed by Newport News. Thus employers are placed in the difficult position of either maintaining their current policies and risking legal action by the EEOC, employees, or their union, or paying substantially more for insurance coverage in order to come into compliance with the EEOC's guidelines.

The difficulty of making this decision is compounded by the conflicting appellate court decisions referred to above, particularly for employers doing business on a multistate basis.[6] Only resolution of the issue presented here can effectively end this predicament.

II. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT.

On October 31, 1978 Congress amended Title VII of the Civil Rights Act of 1964 ("Act"), 42 U.S.C. §2000e *et. seq.*[7] by enacting the Pregnancy Discrimination Act ("PDA"). Pub.L. 95-955. The purpose of the PDA was "to insure that *working women* are protected against all forms of employment discrimination based on sex." S. Rep. No. 331, 95th Cong., 1st

[6] A number of district courts have also addressed this question and have, with one exception, ruled against the EEOC. *See EEOC* v. *Joslyn Mfg. & Supply Co.*, 524 F.Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1134 (7th Cir. April 14, 1982); *EEOC* v. *Emerson Electric Co.*, 539 F.Supp. 153 (E.D. Mo. 1982), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982). *See also, EEOC* v. *Lockheed Missiles & Space Co., Inc.*, 27 FEP Cases 1209 (N.D. Cal. 1981), *aff'd* 680 F.2d 1243 (9th Cir.), petition for rehearing denied, No. 81-4542 (Sept. 27, 1982). The only district court to have ruled in favor of the EEOC was the Central District of California in *United Teachers-Los Angeles* v. *Bd. of Education*, 29 Empl. Prac. Dec. 32,759, *appeal docketed*, No. 82-5360 (9th Cir. March 12, 1982). Of course, the Ninth Circuit's opinion in *Lockheed, supra*, effectively reversed this opinion.

[7] Hereinafter, all references to Title VII will be to sections of the Act.

Sess. July 6, 1977 (emphasis added).[8] In doing so, Congress, in essence reversed this Court's decision in *General Electric* v. *Gilbert*, 429 U.S. 125 (1976), to the extent it applied to female employees.[9]

However, the legislative history makes it abundantly clear that Congress did not intend to change existing law (i.e. the rule of law in *Gilbert*) as it applies to dependants of employees. The Fourth Circuit overlooked or misapprehended this legislative history in holding that the EEOC's guidelines at issue here were valid interpretations of the PDA. When viewed in its entirety, the legislative history reveals that the court below erred in its interpretation of at least two material points of law: (1) the majority's interpretation of the legislative history relating to spousal benefits gives weight to the views of only two senators whose views are totally isolated and in stark contrast to a host of other legislators in both houses; and (2) the majority's interpretation of the language "ability or inability to work" is not consistent with the legislative history which addresses or explains that language.

In this regard, the principal Congressional sponsors of the legislation repeatedly expressed their intent that the Pregnancy Discrimination Act was to apply only to "female *employees*" or "*working* women." Yet, the decision below is devoid of reference to these portions of the legislative history, as well as the committee reports, both of which normally carry great weight in resolving disputes as to the meaning of statutes.

---

[8] This report, along with substantial other portions of the legislative history of the Pregnancy Discrimination Act are printed in a Committee Print dated June 1980, and prepared for the Senate Committee on Labor and Human Resources. Hereinafter, references to the Committee Print will refer to the Legislative History ("Leg. Hist.").

[9] In *Gilbert*, the Supreme Court rejected pregnancy discrimination guidelines the Commission had issued in 1975. The Court held that employers who exclude pregnancy-related disabilities from coverage under income protection plans do not discriminate on the basis of sex under Title VII. Referring to the Commission's regulation, the Court dismissed it as being inconsistent with prior agency pronouncements and in conflict with "other indicia of the proper interpretation of the sex-discrimination provisions of Title VII." 429 U.S. at 14

Senator Harrison Williams, Chairman of both the subcommittee and committee responsible for the legislation, and a principal sponsor of the legislation,[10] stated on introducing S. 995, which ultimately became the PDA:

> ". . . the Supreme Court's decision . . . in the case of Gilbert against General Electric Co. came as a deep disappointment to *working women* across the nation . . . The 6-3 majority in the Gilbert case concluded that *women who must take time off from work* because of pregnancy or related disabilities are not entitled by law to the same benefits that their employers provide for workers who have contracted other disabilities (emphasis added).

Leg. Hist. at 1. *See also* Leg. Hist. at 40.

Senator Jacob Javits, the ranking minority member on the Senate Labor and Human Resources Committee, obviously agreed that the statute's purpose was limited to aiding women employees. During floor debate on the Senate Bill, Senator Javits stated:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant *women employees* to the point where it was last year, before the Supreme Court's decision in Gilbert v. General Electric Corp., 426 U.S. 125 (1976).
>
> . . . . . .
>
> This approach represents only basic fairness for employees who become pregnant. *Without this legislation, they may face a series of obstacles to continuing the*

[10] Senator Williams' statements have added weight in light of the fact that "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1950); *Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967); *NLRB* v. *Fruit and Vegetable Packers and Warehousemen*, 377 U.S. 58 (1964).

pregnancy to term while maintaining their jobs and their incomes. Many women temporarily disabled by pregnancy have been forced to take leave without pay or to resign.

. . . . . .

Mr. President, we can no longer in this country legislate with regard to *women workers* on the basis of outdated stereotypes and myths.

. . . . . .

Arbitrary job discrimination against women based on pregnancy or childbirth has no place in our society. It is my belief that the Federal Government, as a matter of vital social policy, has the responsibility of enacting those laws necessary to assure women of their opportunity for full participation in the workforce (emphasis added).

Leg. Hist. 66-68. Despite the obvious relevance of all of the foregoing legislative history, the Fourth Circuit's decision makes no reference to it.

Moreover, the court below overlooked a telling exchange between Senators Williams and Orrin Hatch which conclusively demonstrates that the statute's application was to be limited to female employees:

Mr. Hatch. The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant. *Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment.* . . . Could the sponsors clarify exactly whom that phrase intends to cover?

. . . . .

Mr. Williams. With regard to more (sic) maintenance plans for pregnancy-related disabilities, I do not see how this language could be misunderstood.

Mr. Hatch. Because it is very broadly drafted and if we say "affected by" it, that included all of those illustrations that I have just enumerated. If it does not, *I want to be sure that everybody knows from the record that it only refers to the woman employee who is pregnant or who becomes pregnant after her employment.*

Mr. Williams. If there is any ambiguity, with regard to income maintenance plans, I cannot see it. "... shall be treated the same for all employment-related purposes." *I do not see how one can read into this any pregnancy other than pregnancy that relates to the employee, and if there is any amiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth, is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.

Mr. Hatch. OK; or the effects on other people as a result of the pregnancy of any female employee.

Mr. Williams. Exactly. It does not.

Mr. Hatch. So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, *what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?*

Mr. Williams. *Exactly.*

Leg. Hist. at 80. (emphasis added)

These extensive quotes from the legislative history of the PDA demonstrate that without exception, the Senate proponents of the Act repeatedly articulated the need for remedial legislation to aid *working women. EEOC* v. *Emerson Electric, Co.*, 539 F.Supp. 153 at 156-157. (E.D. Mo. 1982), *appeal docketed,* No. 82-1647 (8th Cir. May 27, 1982).

The same is true as regards proponents in the House of Representatives. For example, Congressman Augustus F. Hawkins, who introduced the House bill noted the tremendous increases in the numbers of women in the American work force. Congressman Hawkins stated, "[i]n the last decade women accounted for nearly three-fifths of the increase in the civilian labor force." Leg. Hist. at 12.

Likewise, speaking on the Senate Floor Senator Williams expounded:

> In recent years, the family unit has undergone many changes. There are more women in the workforce now than ever before, both married and unmarried. Approximately 46 percent of all women over the age of 16 are in the labor force today. There are now 39 million women who are working or seeking work. Twenty-five million of these women are doing so because of the basic need to support their families-because they have husbands who earn less than $7000 a year or because they are single, divorced, or widowed.

Leg. Hist. at 3.

Despite the overwhelming weight of the legislative history outlined above, the Fourth Circuit ignores it, relying solely on isolated statements by Senators Bayh and Cranston. The majority's reliance upon Senator Bayh's statement is particularly puzzling because, rather than definitive, the Senator's statement is contemplative and reflective in tone. The Senator states:

> While *it is difficult to second-guess the courts,* I feel that the history of sex discrimination cases under the 14th amend-

> ment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents *will* require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees. (emphasis added).

Leg. Hist. at 75. In fact, the Ninth Circuit in *Lockheed Missiles & Space Co., supra,* relied on this same language for its conclusion that the dependents' benefits question must be resolved on the basis of pre-PDA law. 680 F.2d 1245 at n.2. See also *EEOC* v. *Emerson Electric Co., supra,* 539 F.Supp. at 156. Quite the contrary to the Senator's musings, the Supreme Court held in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), that the exclusion of pregnancy benefits does not violate the 14th amendment.

Thus, the sole support for the Court's conclusion becomes Senator Cranston's *unsupported* statement that, in his view, pregnancy benefits for the spouses of males are mandated. We submit that Senator Cranston's view, in light of the overwhelming views to the contrary, is unimpressive.

Moreover, even Senator Cranston, in describing the need for the PDA, referred to the "treatment of pregnant women in covered employment" and the need to "focus not on their condition alone, but on the actual effects of that condition on their ability to work." Leg. Hist. at 130-131. *See EEOC* v. *Lockheed Missiles & Space Systems Co., supra* at n.2.

The Fourth Circuit majority, relying on the Senate Committee Report, concludes that Congress may well have intended to leave the question of dependents' benefits an "open question." (Slip op. at 8) Despite this concession, the majority rejects Newport News' contention that the question of dependents' benefits should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act; that is, judged by the standard laid down by this court in *General Electric* v. *Gilbert, supra.* But in doing so, the majority overlooks a significant statement in the same committee report:

> . . . it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of Title VII law as regards sex discrimination.
>
> * * *
>
> Therefore, the question in regard to dependents' benefits would be determined on the basis of existing Title VII principles.

Leg. Hist. at 42-43.

The plain and only meaning of "existing" in this context is the case and statutory law in existence prior to passage of the Pregnancy Discrimination Act. Accordingly, the majority's rejection of the company's contention that pre-Title VII principles were controlling was clear error.

III. THE MAJORITY OPINION MISCONSTRUED THE LANGUAGE OF THE STATUTE.

The majority's opinion, as pointed out by the dissent, strains the language of the Pregnancy Discrimination Act which states that ". . . women affected by pregnancy . . . shall be treated the same for all employment related purposes . . . as other persons similar in their ability or inability to work . . .". In this regard, the majority states that whether or not benefits are provided to a spouse of an employee is an "employment-related purpose." (Appendix 5a) The court further states:

> The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the *coverage*. In fact, the statute says "as other *employees* not so affected."

Appendix 6a.

In addition to the logical imperative that a "person similar in their ability or inability to work" must be an employee, the majority overlooks legislative history which demonstrates that Congress repeatedly used the terms "employee" and "person" interchangeably. Both the Senate and House Committee Reports, which accompanied the final legislation, stated:

> . . . The bill would simply require that pregnant women be treated the same as *other employees* on the basis of their ability or inability to work. (emphasis added).

Leg. Hist. at 40 (Senate Report) and 150-151 (House Report).

Moreover, Congressman Augustus F. Hawkins who introduced the House version of the bill which became the Pregnancy Discrimination Act described the Congressional intent as follows:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify Congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers be treated the same as other employees on the bases of their ability or inability to work.*

Leg. Hist. at 166.

Congressman Hawkins' view of the legislation's purpose had not changed by the end of the legislative process for he used identical terms in calling up the Conference Report. *See* Leg. Hist. at 206.

It is, of course, significant that the language of the Congressional Reports, as well as that of Congressman Hawkins is identical to that of the statute except that the word "employees" is used instead of "persons." It is beyond cavil that they have been used interchangeably. Accordingly, the Fourth Circuit's overlooking of the legislative history justifies granting Petitioner's writ.

CONCLUSION

For the foregoing reasons, the Chamber respectfully urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record

CYNTHIA WICKER
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

Attorneys for *amicus curiae*
Chamber of Commerce of the United States

Exhibit 1

FMC Corporation

Executive Offices
200 East Randolph Drive
Chicago Illinois 60601
(312) 861-6000

October 22, 1980

Mr. Steven A. Bokat
National Chamber Litigation Center
1615 M. Street, N. W.
Washington, DC 20062

Dear Steve:

As discussed, an actuarial valuation was conducted on the cost impact of various aspects of the Pregnancy Discrimination Act on our health care plans. The valuation was completed on June 6, 1980 by a "big-eight" accounting firm with expertise in health care plan valuations. Generally acceptable actuarial sources, including HHS data, was utilized in the study.

The estimated annual claim cost projected for the twelve month period commencing September 1, 1980 are:

- Increasing the maternity coverage of *female spouses* to the level of covering maternity as any other disability (MAAOD) with immediate coverage (first nine months of employment and no extended coverage (after employment ceases).
  Annual Cost = $454,700.
- Providing extended maternity coverage for *female employees* on a MAAOD basis.
  Annual Cost = $97,700.
- Providing extended maternity coverage for *female spouses* on a MAAOD basis.
  Annual Cost = $204,400.

- Providing immediate maternity coverage for *female spouses* on a MAAOD basis.
  Annual Cost = $180,600.

The challenged guidelines will force us to incur an estimated annual $937,400 increase in our health care plans. Since the PDA has unfavorable cost consequences to us, we will be pleased to assist you and the NCLC in any possible manner.

Best regards,

s/s Ken

K. J. Morrissey, Manager
Employee Benefits

cc: V. H. Hare

Exhibit 2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

Stanley T. Kaleczyc, Esquire
The National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
Certified No. 753100
RETURN RECEIPT REQUESTED

In Response Refer To: 79-7-FOIA-213

Dear Mr. Kaleczyc:

This is in response to your Freedom of Information Act request of July 2, 1979. Inasmuch as we were unable to conduct, within the allotted amount of time, a search for the records which you seek, you agreed to an additional extension of 7 working days until August 21, 1979.

You request all correspondence received, as well as documents (surveys, etc.) generated, by the Commission regarding the economic impact, on employers, of the recent amendment of the Commission's Guidelines on Discrimination Because of Sex. You indicate, however, that you do not seek correspondence received during the period that was allowed for public comment on the amendment of the subject guidelines.

The cost of copying the subject records is $27.00. The cost of conducting the search is $80.00. Thus, the total cost of processing your request is $107.00. This will confirm, however, that Mr. Bokat of your office explained in a telephone conversation with Calvin Washington of my staff that the cost of processing your request exceeds the amount you wish to pay. Accordingly, Mr. Bokat indicated that the request would be withdrawn.

Additionally, in the aforementioned telephone conversation, Mr. Bokat requested that we provide a statement as to whether the EEOC has conducted a survey or study concerning the economic impact, on employers, of complying with the amendments to EEOC Guidelines on Discrimination Because of Sex. This will confirm that the Commission has not engaged in any such project.

Sincerely,

/s/ CONSTANCE L. DUPRE
Associate General Counsel
Legal Counsel Division

Exhibit 3

AFFIDAVIT

I, Charles E. Ginsberg, being duly sworn, state that:

1. I am a Vice President and Assistant Manager of the Research and Technical Services division of the Human Resource Management group of Alexander & Alexander.

2. Alexander & Alexander's Human Resource Management group consists of more than three hundred professionals in sixty-four cities. We have more than five thousand clients, one hundred seventy-four of whom are in the Fortune 1000.

3. Prior to enactment of the Pregnancy Discrimination Act, it was common for employers who provided health benefit plans to place dollar or duration (i.e., day) limitations on female employee or dependent medical benefits for maternity, and to require conception to occur after plan coverage commenced.

4. Prior to enactment of the Pregnancy Discrimination Act, it was not uncommon for employers to require female employees to purchase family coverage in order to be covered for maternity.

5. Prior to publication of the EEOC's interpretation of the Pregnancy Discrimination Act with respect to the extension of medical benefit coverage beyond employment termination, most employers who provided such an extension did so on the following basis:

   (a) employees were provided extended benefits for nonpregnancy-related conditions only if they were totally disabled at the time of termination.

   (b) employees pregnant at the time of employment termination were provided extended benefits for pregnancy-related conditions, whether or not disability existed.

6. Since publication of the EEOC's interpretation of the extended benefits requirements, there has been a definite trend among our clients to require total disability at termination of employment for benefits to be extended for all conditions. Thus, in such cases, nonpregnancy-related conditions are treated as before and pregnancy-related conditions require total disability at termination. As a result, the pregnant employee who is not totally disabled at termination loses the extension of benefits coverage she had prior to publication of the EEOC interpretation of the Act.

7. The above statement as to employer trends is based on a telephone survey of A&A consultants responsible for consulting with respect to health benefits programs, both on a personal and supervisory basis. They are located in A&A's Kansas City, Los Angeles, New York, Detroit and Chicago offices.

/s/ CHARLES E. GINSBERG

Charles E. Ginsberg

COMMONWEALTH OF MASSACHUSETTS ESSEX } ss

November 26, 1980

Then personally appeared the above-named Charles E. Ginsberg, known to me, who declared that the above is true to the best of his knowledge and belief, before me

/s/ PAMELA J. RANKIN

Pamela J. Rankin,
Notary Public

My commission expires 12/08/83

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

ANDREW M. KRAMER
GERALD D. SKONING
DEBORAH CRANDALL
DAVID D. KADUE
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400
Attorneys for Petitioner

Dated: January 20, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Does an employer which provides health insurance benefits for employees and their dependents discriminate against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing only limited coverage for pregnancy-related expenses incurred by male employees' wives? [a]

PARTIES

Petitioner, Newport News Shipbuilding and Dry Dock Company, and Respondent, the Equal Employment Opportunity Commission, were the only parties to the proceedings before the court below.[b] Newport News Shipbuilding and Dry Dock Company, a corporation, is a wholly-owned subsidiary of Tenneco Corporation, which is a subsidiary of Tenneco, Inc.

---

[a] Subsidiary questions are:

(1) In enacting the Pregnancy Discrimination Act, did Congress overturn the rationale, as well as the holding, of this Court's decision in General Electric Co. v. Gilbert?

(2) In enacting the Pregnancy Discrimination Act, did Congress make it unlawful under Title VII for an employer to make *any* distinctions based on pregnancy, childbirth, or related medical conditions even if such distinctions are not prohibited by the sex discrimination bans found in Sections 703(a) and 704 of Title VII?

[b] The Chamber of Commerce of the United States and the Equal Employment Advisory Council also participated in the proceedings in the court below as *amici curiae* urging affirmance of the decision of the district court. The United Steelworkers of America, AFL-CIO-CLC, and John McNulty, Defendants in Civil Action No. 80-20-NN, did not participate in the proceedings in the court below.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
THE PROCEEDINGS BELOW	5
The District Court	5
The Court of Appeals	8
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. THE COURT BELOW MISINTERPRETED THE PDA	9
A. By Its Terms, The PDA Is Applicable Only To Female Employees And Female Applicants For Employment	10
B. The PDA Was Remedial Legislation Designed To Ease The Pregnancy-Related Burdens Faced By Women In The Labor Market Or Desiring To Enter The Labor Market	13
C. The PDA Did Not Change The Law With Respect To Male Employees Or Their Wives	19
D. The Remarks Of Senators Bayh And Cranston Are Entitled To No Deference	26
E. The PDA Overturned *Gilbert* Only With Respect To Pregnancy-Related Title VII Claims Made By Female Employees And Female Applicants For Employment	29
II. THE DISTRICT COURT CORRECTLY DECIDED THAT QUESTIONS AND ANSWERS 21 AND 22 ARE CONTRARY TO LAW AND ENTITLED TO NO JUDICIAL DEFERENCE	32

TABLE OF CONTENTS—Continued

Page

III. THE DISTRICT COURT CORRECTLY DECIDED TO DISMISS THE EEOC'S COMPLAINT 41

CONCLUSION 49

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 32

Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commw. 103, 373 A.2d 126, 20 Fair Empl. Prac. Cases (BNA) 1411 (Pa. Commw. Ct. 1977) 23

Association of American Railroads v. United States, 603 F.2d 953 (D.C. Cir. 1979) 33

Barone v. Hackett, 28 Fair Empl. Prac. Cases (BNA) 1765 (D.R.I. 1982) 9, 12

Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y. 2d 84, 359 N.E. 2d 393, 390 N.Y.S. 2d 884, 14 Fair Empl. Prac. Cases (BNA) 42 (1976) 22

Califano v. Webster, 430 U.S. 313 (1977) 31

Cannon v. University of Chicago, 441 U.S. 677 (1979) 15

Chandler v. Roudebush, 425 U.S. 840 (1976) 19

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 29

County of Washington v. Gunther, 101 S. Ct. 2242 (1981) 47

Delta Air Lines, Inc. v. Kramarsky, 485 F. Supp. 300 (S.D.N.Y. 1980), *rev'd in part, vacated in part*, 650 F.2d 1287 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982) 22

Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982) 46

EEOC v. A.R.A. Manufacturing Co., No. CA3-81-0406-F (N.D. Tex. Aug. 18, 1982) 9

EEOC v. Emerson Electric Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 9, 12

EEOC v. Joslyn Manufacturing and Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) 9, 12, 29

TABLE OF AUTHORITIES—Continued

Page

EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for rehearing denied*, No. 81-4542 (Sept. 27, 1982), *petition for writ of certiorari filed*, No. 82-1006 (Dec. 15, 1982) .. 9, 10, 12, 29, 39, 41

Ernst & Ernst v. Hochfelder, 425 U.S. 185, *petition for rehearing denied*, 425 U.S. 986 (1976) .. 32

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 32

Fullilove v. Klutznick, 448 U.S. 448 (1980) 31

Geduldig v. Aiello, 417 U.S. 484 (1974) 38, 42

General Building Contractors Association, Inc. v. Pennsylvania, 102 S. Ct. 3141 (1982) 31

General Electric Co. v. Gilbert, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977) ..... *passim*

Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977) 13

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 28

Kahn v. Shevin, 416 U.S. 351 (1974) 31

Kimberly-Clark Corp. v. Labor & Industry Review Commission, 95 Wis. 2d 558, 291 N.W. 2d 584, 23 Empl. Prac. Dec. (CCH) ¶ 30,905 (Wis. Ct. App. 1980) 45

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 28, 29, 38, 42, 44, 45, 47

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 14

Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982) 31

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 32

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 29, 38, 39, 42

TABLE OF AUTHORITIES—Continued

	Page
National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, *petition for rehearing denied*, 387 U.S. 926 (1967)	15
NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964)	15
Quern v. Mandley, 436 U.S. 725 (1978)	28
Ray-O-Vac v. Department of Industry, Labor and Human Relations, 70 Wis. 2d 919, 236 N.W. 2d 209, 12 Fair Empl. Prac. Cases (BNA) 64 (1975)	23
Schlesinger v. Ballard, 419 U.S. 498 (1975)	31
Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1950)	15
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	32
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	28
Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D. N.Y. 1980)	32
United States v. Larionoff, 431 U.S. 864 (1977)	32
United States v. UAW, 352 U.S. 567 (1957)	19
United Steelworkers v. Weber, 443 U.S. 193 (1979)	31
United Teachers-Los Angeles v. Board of Education, 29 Empl. Prac. Dec. (CCH) ¶ 32,759 (C.D. Cal.), *appeal docketed*, No. 82-5360 (9th Cir. March 12, 1982)	9
Zuber v. Allen, 396 U.S. 168 (1969)	19, 29
Statutes:	
Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1978)	*passim*
5 U.S.C. §§ 701-06	6
28 U.S.C. § 451	7
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	6
28 U.S.C. § 1343	7
28 U.S.C. § 1345	7
28 U.S.C. §§ 2201-02	6
29 U.S.C. § 206(d)	33, 47

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. §§ 2000e, *et seq.* ..... *passim*
N.Y. Work Comp. Law § 201(9)(A)(B) (McKinney Supp. 1982) 22

Legislative Materials:

S. Rep. No. 331, 95th Cong., 1st Sess. (1977) ..17, 19, 20, 21, 22, 31, 34
H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978).... 19, 20, 22
H.R. Rep. No. 1786, 95th Cong., 2d Sess. (1978).. 18, 19
Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* (Comm. Print 1980) ..... *passim*
Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977) 23, 26
Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977) 23
123 Cong. Rec. S4142-43 (daily ed. March 15, 1977) (remarks of Sen. Williams) 16
123 Cong. Rec. E1487 (daily ed. March 15, 1977) (remarks of Rep. Hawkins) 16
123 Cong. Rec. E2095 (daily ed. April 5, 1977) (remarks of Rep. Hawkins) 16, 23
123 Cong. Rec. S4144 (daily ed. March 15, 1977) (remarks of Sen. Brooke) 17, 23
123 Cong. Rec. S4145 (daily ed. March 15, 1977) (remarks of Sen. Mathias) 17
123 Cong. Rec. S4403 (daily ed. March 18, 1977) (remarks of Sen. Bayh) 17
123 Cong. Rec. S14,989 (daily ed. Sept. 15, 1977) (remarks of Sen. Williams) 17
123 Cong. Rec. S14,991 (daily ed. Sept. 15, 1977) (remarks of Sen. Javits) 18

TABLE OF AUTHORITIES—Continued

Page

123 Cong. Rec. S14,992 (daily ed. Sept. 15, 1977) (remarks of Sen. Kennedy) 17
123 Cong. Rec. S15,037 (daily ed. Sept. 16, 1977) (remarks of Sen. Bayh) 27, 37
123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977) (remarks of Sen. Williams and Sen. Hatch) 26
123 Cong. Rec. S15,049 (daily ed. Sept. 16, 1977) (remarks of Sen. Javits) 18
123 Cong. Rec. S15,054 (daily ed. Sept. 16, 1977) (remarks of Sen. Helms) 23
123 Cong. Rec. S15,056 (daily ed. Sept. 16, 1977) (remarks of Sen. Biden) 17
123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977) (remarks of Sen. Cranston) 17, 27, 37
123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977) (remarks of Sen. Mathias) 17
123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977) (remarks of Sen. Culver) 17
124 Cong. Rec. H6863 (daily ed. July 8, 1978) (remarks of Rep. Hawkins) 17
124 Cong. Rec. H6865 (daily ed. July 18, 1978) (remarks of Rep. Green) 18
124 Cong. Rec. H6867 (daily ed. July 18, 1978) (remarks of Rep. Akaka, Rep. Corrada, and Rep. Quie) 18
124 Cong. Rec. H6868 (daily ed. July 18, 1978) (remarks of Rep. Chisholm) 18
124 Cong. Rec. H6869 (daily ed. July 18, 1978) (remarks of Rep. Collins, Rep. LaFalce, and Rep. Whalen) 18
124 Cong. Rec. H6870 (daily ed. July 18, 1978) (remarks of Rep. Tsongas) 18
124 Cong. Rec. 6870 (daily ed. July 18, 1978) (remarks of Rep. Burke) 18
124 Cong. Rec. H13,495 (daily ed. Oct. 14, 1978) (remarks of Rep. Hawkins) 17
124 Cong. Rec. H13,495-96 (daily ed. Oct. 14, 1978) (remarks of Rep. Sarasin) 18

TABLE OF AUTHORITIES—Continued

Page

124 Cong. Rec. S18,977 (daily ed. Oct. 13, 1978) (remarks of Sen. Williams) 15
124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978) (remarks of Sen. Javits) 17, 18
124 Cong. Rec. S18,979 (daily ed. Oct. 13, 1978) (remarks of Sen. Stafford) 17

Administrative Materials:

29 C.F.R. § 800.116(d) 37
29 C.F.R. § 1604.9(d) 34
29 C.F.R. § 1604.9(e) 34
29 C.F.R. § 1604.10(b) 33
29 C.F.R. Part 1604 (Appendix) 5, 12, 47
41 C.F.R. § 60-20.3(c) 37
45 C.F.R. § 86.56(b) 37
37 Fed. Reg. 6836 (1972) 33, 34
44 Fed. Reg. 13,278-81 (1979) 35
44 Fed. Reg. 23,804 (1979) 35, 36
44 Fed. Reg. 23,805 (1979) 35, 37
44 Fed. Reg. 23,807-08 (1979) 36

Miscellaneous:

Benston, *The Economics of Gender Based Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489 (1982) 46
Unpublished data, *National Hospital Discharge Survey*, National Center for Health Statistics (1981) 38
Employment and Earnings, Bureau of Labor Statistics, Dec. 1982 38
CCH EEOC Dec. (1973) ¶ 6084 (Dec. No. 70-360 (1969)) 39
CCH EEOC Dec. (1973) ¶ 6221 (Dec. No. 71-1474 (1971)) 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The final opinion of the court below is an unreported one-paragraph *per curiam* opinion issued after rehearing *en banc*. It is reproduced at 1a (App.).[1] This *per curiam* opinion adopted the rationale set forth in the panel opinion, which is reported at 667 F.2d 448 and is reproduced at 2a-8a (App.). The amended opinion and order of the district court in Civil Action No. 80-20-NN is reported at 510 F. Supp. 66 and is reproduced at 9a-20a (App.). The district court's initial opinion and order in Civil Action No. 80-20-NN is reported at 24 Fair Empl. Prac. Cases 1363. The district court's final order in Civil Action No.

[1] References herein shall be in accordance with the following convention: to pages in the Appendix to the Petition for a Writ of Certiorari: —— (App.); to pages in the Joint Appendix: J.A. ——, to pages in the Petition for a Writ of Certiorari: Pet. ——; to pages in the Brief filed by Respondent in Response to Petition for a Writ of Certiorari: R. Br. ——.

80-237-NN, which is unreported, is reproduced at 21a (App.).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The final judgments of the court below were entered on June 22, 1982. The Petition herein was filed on September 10, 1982 and was granted on December 6, 1982.

STATUTES AND REGULATIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. Law 95-555, 92 Stat. 2076 (Oct. 31, 1978), and certain regulations and interpretive guidelines issued by the Equal Employment Opportunity Commission ("EEOC"). Pertinent provisions of Title VII and the EEOC's regulations and guidelines are set forth in their entirety at Pet. 2-6. The full text of the PDA is set forth at 50a-51a (App.).

STATEMENT OF THE CASE

Newport News Shipbuilding and Dry Dock Company [hereinafter, "the Shipyard"] is an employer subject to the provisions of Title VII. As a self-insurer, the Shipyard provides a Hospitalization and Medical-Surgical Plan [hereinafter, "the Plan"] for "all active, full-time, production, maintenance, technical and clerical areas' bargaining unit eligible employees" who have been on the payroll for three continuous months.[2] The Plan, established in 1951, covers eligible employees of both sexes, their spouses, and their unmarried children who are between the ages of 14 days and 19 years.[3] It has three

[2] The full text of a booklet describing the principal features of the Plan is reproduced at 24a-49a (App.).

[3] *See* 29a (App.). Coverage is extended to unmarried children over the age of 19 years under certain limited circumstances. *See* 30a (App.).

components—a Major Medical Component, a Medical-Surgical Component, and a Hospitalization Component. After exhaustion of a $100 per person per calendar year deductible, the Major Medical component of the Plan provides reimbursement for 80% of the reasonable and customary charges for all covered medical expenses, up to a lifetime maximum of $25,000 per person.[4] With specific exclusions and limitations, the Medical-Surgical component of the Plan provides reimbursement for 100% of the reasonable and customary charges for all surgical procedures. The Hospitalization component provides 100% reimbursement for the cost of a semi-private hospital room, intensive care unit, or coronary care unit for up to 120 days, plus 100% of the first $750 of the reasonable and customary charges for hospital services (including general nursing care, x-ray examinations, and drugs) and other necessary services while hospitalized, plus 80% of the charges for hospital services exceeding $750 to a maximum of 120 days.[5]

With respect to the normal pregnancies of female employees and the spouses of male employees alike, the Hos-

---

[4] *See* 32a-34a (App.).

[5] The Plan provides limited coverage for, *inter alia*, oral surgery, injuries and illnesses treated in a hospital emergency room, mental care when the patient is not hospitalized, and spousal maternity benefits. *See* 37a-39a (App.). By virtue of its "Coordination of Benefits" provisions, the Plan also limits reimbursements for expenses covered by Medicare and limits dependent coverage by providing that expenses incurred by a spouse employed elsewhere are to be paid first by the spouse's group plan, if any. *See* 34a-36a, 47a-48a (App.). The Plan totally excludes coverage for, *inter alia*, charges by a psychologist not recommended by and under the direction of a psychiatrist, charges covered by Workers' Compensation, charges incurred as a result of an act of violence or riot if the person seeking reimbursement is determined to be the aggressor, charges for well baby care (routine charges made by the hospital and doctor for the care of a normal, healthy newborn), charges for non-prescription drugs and medicines, charges for certain pre-existing conditions, charges for eyeglasses, charges for unnecessary cosmetic surgery, charges for routine physical examinations, and charges for preventative innoculations. *See* 31a, 42a-44a (App.).

pitalization component of the Shipyard's Plan historically provided reimbursement for up to 100% of the reasonable and customary charges for delivery and anesthesiologists, and up to $500 of all other hospital charges. By virtue of its Major Medical and Medical-Surgical components, the Plan also historically reimbursed the Shipyard's pregnant employees, like the pregnant spouses of its employees, and like all other employees and dependents, for 80% (after a $100 per calendar year deductible) of the reasonable and customary charges for all covered medical expenses, up to a lifetime maximum of $25,000 per person and for 100% of the reasonable and customary charges for certain surgical procedures.

After enactment of the PDA, the Shipyard amended the Hospitalization component of its Plan to provide that, "Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement . . . ." [6] Because the Shipyard did not similarly amend the Hospitalization component with respect to the spouses of its male employees, the $500 limitation still applies to the pregnancy-related hospitalization costs incurred by the wives of male employees in the event of normal pregnancies.[7]

---

[6] The PDA became effective on October 31, 1978. It required all fringe benefit programs in effect as of October 31, 1978 to come into compliance by April 29, 1979. For a period of one year from October 31, 1978, the PDA prohibited any employer which had a fringe benefit plan in effect on October 31, 1978 from reducing benefits or compensation in order to come into compliance with its terms. The full text of the PDA is reproduced at 50a-51a (App.).

[7] The booklet describing the principal features of the Plan describes the currently-effective maternity benefits hospitalization provision as follows:

> 28. What maternity benefits are provided?
>
> A. The Basic Plan pays up to $500 of the hospital charges and 100% of reasonable and customary charges for delivery and anesthesiologist charges.
>
> B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital

THE PROCEEDINGS BELOW

1. The District Court.

On September 20, 1979, John McNulty, a Shipyard employee covered by the Plan, filed a charge with the EEOC. J.A. 15. He claimed that the Plan unlawfully discriminated against him because of his sex in that it limited to $500 the hospitalization coverage available for his wife's pregnancy. *Id.* The United Steelworkers of America ("the Steelworkers") later filed a similar charge against the Shipyard on behalf of other individuals. J.A. 16.[8] The allegations of these charges found support in Questions and Answers 21 and 22, which state the EEOC's position that an employer's insurance program which "covers the medical expenses of spouses of female employees must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." 29 C.F.R. Part 1604 (App.) (Question and Answers 21).[9]

In response to these charges, and to the EEOC's position with respect to them, the Shipyard filed a complaint seeking a declaratory judgment that Questions and Answers 21 and 22 were *ultra vires*, as well as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. J.A. 5-14. The Shipyard also sought to permanently enjoin the EEOC from enforcing these Questions and Answers and to require the EEOC to publish a

---

confinement as described in Question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

C. Maternity benefits for the wife of a male employee will continue to be paid as described in part "A" of this question.

37a (App.).

[8] The Steelworkers, a labor organization, is the collective bargaining representative of the Shipyard's production and maintenance employees.

[9] The full text of Questions and Answers 21 and 22 is reproduced at Pet. 5-6.

notice in the Federal Register declaring them null and void. *Id.*[10]

The EEOC subsequently filed a Title VII complaint against the Shipyard in the same court. The EEOC's complaint alleged that the Shipyard "has intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII" since 1965 because it has "imposed a limit of $500 on the hospital charges for dependent spouses of male employees for delivery or other pregnancy-related conditions, for which Defendant will pay" and, therefore, "has discriminated and is discriminating against its male employees with respect to compensation, terms, conditions and privileges of employment because of their sex." J.A. 28-30. This claim is based on the EEOC's view that:

> [A] health insurance plan provided by an employer for his workers and their families which limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is therefore provided a smaller compensation package than his female co-worker. This practice on its face violates Section 703(a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's . . . sex."

R.Br. 6-7. The EEOC sought an order enjoining the Shipyard from engaging in any employment practices which

---

[10] Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), and 5 U.S.C. §§ 701-06 (administrative procedure act). The Defendants in this action were the EEOC, the Steelworkers, and McNulty. The latter two Defendants were included pursuant to Rule 19(a)(2) of the Federal Rules of Civil Procedure. The district court found that it had jurisdiction of this matter pursuant to 28 U.S.C. §§ 2201-02. 510 F. Supp. at 71 (17a (App.)).

discriminate because of sex, an order requiring the Shipyard to provide equal compensation to its male employees in the future, monetary relief for those male employees allegedly discriminated against by operation of the Plan, and other affirmative relief designed to eradicate the effects of the alleged discrimination.[11] J.A. 30-31.

In granting the Shipyard's motion for summary judgment in the first case, the district court declared that Questions and Answers 21 and 22 are contrary to law and are of no force and effect. 510 F. Supp. at 71 (16a-17a (App.)). It also held that the Shipyard's Plan was not discriminatory on its face and that there was no showing that the Plan, by limiting reimbursements for the pregnancy-related expenses of spouses of male employees, had caused any gender-based effect in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). *Id.* It further held that McNulty was entitled to no benefits under Title VII which were not already provided to him under the Plan. *Id.*

The district court concluded that the PDA changed the law of Title VII only with respect to female employees and applicants for employment, and that the legislative history of the PDA indicates that the issue of maternity benefits for male employees' wives would have to be resolved using "the existing principles of Title VII." 510 F. Supp. at 70 (15a-16a (App.)). According to the district court, "the existing principles of Title VII" with respect to McNulty's claim, and all others involving neither female employees nor applicants for employment, are set forth in this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977). 510 F. Supp. at 71 (16a (App.)).

---

[11] The EEOC invoked the district court's jurisdiction pursuant to 28 U.S.C. § 451 (courts and judges), 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 1345 (United States as plaintiff), as well as 42 U.S.C. § 2000e-5(f)(1) and (3) (Title VII).

For the reasons stated in its decision in the declaratory judgment case, the district court subsequently granted the Shipyard's motion to dismiss the EEOC's complaint in the Title VII case for failure to state a claim upon which relief could be granted. 21a (App.).

2. The Court of Appeals.

A divided panel of the Fourth Circuit, having consolidated the cases, reversed the district court's decisions and remanded both cases to the district court. 22a & 23a (App.). The panel majority found that the PDA overturned *Gilbert* in its entirety and that the Shipyard's Plan is unlawful on its face. 667 F.2d at 450-51 (4a-7a (App.)). Judge Hall dissented from the majority opinion of the panel. In his opinion, "pregnancy-based classifications are lawful except to the extent that . . . *Gilbert* . . . has been limited by the Act." 667 F.2d at 452 (Hall, J., dissenting) (citations omitted). 8a (App.).

On rehearing *en banc*, the Fourth Circuit issued a *per curiam* decision affirming the panel's decision with three judges dissenting. 1a (App.).

SUMMARY OF ARGUMENT

The PDA was remedial legislation designed to alleviate the pregnancy-related barriers faced by women in the workforce and women desiring to enter the workforce. It did not change in any way an employer's Title VII obligations with respect to its male employees or their spouses. Indeed, in enacting the PDA, Congress expressly stated that the PDA would not require employers to provide maternity benefits for the spouses of their male employees to the same extent that they provide such benefits for their female employees. This Court's decision in *Gilbert* therefore governs the outcome of this "reverse" Title VII litigation. Moreover, even if *Gilbert* were no longer the law, the Shipyard's Plan, on its face, simply does not violate § 703(a)(1) of Title VII. The decisions of the district court were proper in all respects and should have been affirmed by the court below.

ARGUMENT

I. THE COURT BELOW MISINTERPRETED THE PDA.

The court below concluded that the PDA made it unlawful for an employer's medical insurance plan to make *any* distinctions based on pregnancy, childbirth, or related medical conditions. 667 F.2d at 450-51 (5a-7a (App.)). Although conceding that the district court's construction of the PDA found support in "some legislative history," the court below nevertheless found the Shipyard's Plan unlawful because:

> The language of the new statute strongly indicates a purpose to equate pregnancy, childbirth and related medical conditions with sex. Distinctions based on pregnancy, the Congress said, are distinctions based on sex.
>
> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

667 F.2d at 451 (7a (App.)). The court below stands alone in its construction of the PDA.[12]

Its view comports with neither the PDA's language nor its legislative history. Properly construed, the PDA

---

[12] *See* EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for rehearing denied*, No. 81-4542 (Sept. 27, 1982), *petition for writ of certiorari filed*, No. 82-1006 (Dec. 15, 1982); EEOC v. A.R.A. Mfg. Co., No. CA3-81-0406-F (N.D. Tex. Aug. 18, 1982); EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982); EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982). *See also* Barone v. Hackett, 28 Fair Empl. Prac. Cases (BNA) 1765, 1769-70 (D.R.I. 1982). The only case to support the decision of the court below—United Teachers-Los Angeles v. Board of Ed., 29 Empl. Prac. Dec. (CCH) ¶ 32,759 (C.D. Cal.), *apeal docketed*, No. 82-5360 (9th Cir. March 12, 1982)—has been effectively nullified by the Ninth Circuit's decision in *Lockheed*.

changed the law of Title VII only with respect to female employees and female applicants for employment. It thus had only a limited impact on this Court's decision in *Gilbert*.

A. By Its Terms, The PDA Is Applicable Only To Female Employees And Female Applicants For Employment.

The PDA added a new subsection to the "Definitions" section of Title VII (Section 701). The pertinent part of this new subsection, Section 701(k), appears in two clauses separated by a semicolon:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e-(k).

In construing this language to extend beyond female employees and applicants for employment, the court below correctly noted that, "There is nothing in the first clause to suggest that the definition will vary depending upon the employment status of the pregnant woman." 667 F.2d at 450 (5a (App.)). What the court somehow failed to recognize, however, is that this clause, standing alone, has no meaning. To have any meaning at all, the PDA's first clause must be read together with some other part of Title VII where the words "because of sex" or "on the basis of sex" appear. *See Lockheed*, 680 F.2d at 1245.

When read together with § 703(a)(1), which the Shipyard allegedly violated in this case, the PDA's first clause makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employ-

ment, *because of such individual's . . . [pregnancy, childbirth, or related medical conditions]*. So read, the PDA's first clause is clearly limited in scope to employees and applicants for employment. Neither before nor after enactment of the PDA did an employee's spouse, as such, receive "compensation" or have "terms, conditions, or privileges of employment." [13] Nor can it be posited that the PDA's first clause changed in any way an employer's § 103(a)(1) obligations with respect to its male employees. Male employees simply cannot become pregnant.[14]

The court below also misconstrued the PDA's second clause, which contains the only requirement of the PDA itself. The Shipyard contends that the PDA's second clause requires employers to treat female applicants for employment "affected by pregnancy" the same as other applicants for employment "similar in their ability or inability to work" and to treat female employees "affected by pregnancy" the same as other employees "similar in their ability or inability to work."

The interpretation given to this clause by the court below is less than pellucid. It appears, however, that the court determined that a male employee's spouse can be a "woman affected by pregnancy" and that a spouse is also a "person" within the meaning of that clause. 667 F.2d

---

[13] The EEOC does not claim that the Shipyard's Plan violates § 703(a)(2). It is nevertheless worth noting that, when read together with the PDA's first clause, § 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his *employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . [pregnancy, childbirth, or related medical conditions]*." This provision is also clearly inapplicable to non-employees.

[14] While the court below apparently found the Shipyard's Plan unlawful because it "contains a distinction based on pregnancy," the EEOC's complaint alleges that the Plan is unlawful because it provides less compensation for male employees than for female employees.

at 450-51 (5a-6a (App.)).[15] If this were correct, the PDA would require a spouse affected by pregnancy to be treated the same as another spouse "not so affected but similar in [her] ability or inability to work." This reading imposes on an employer an impossible task. As Judge Hall pointed out in his dissent in the decision at issue herein:

> To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee. To hold otherwise is to simply ignore the language of the Act.

667 F.2d at 452 (Hall, J., dissenting) (8a (App.)). *See also Lockheed*, 680 F.2d at 1245 ("[t]he second clause in its reference to women employees ('employment-related purposes'; 'other persons not so affected but similar in their ability or inability to work') clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent"); *Barone v. Hackett*, 28 Fair Empl. Prac. Cases at 1769 ("this language suggests that Congress intended to afford pregnant women the right to equal treatment in the employment setting"); *EEOC v. Emerson Electric Co.*, 28 Fair Empl. Prac. Cases at 1555 ("the phrase 'shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work,' seems to confine the comparison required by the statute to employees"); *EEOC v. Joslyn Manufacturing Co.*, 27 Fair. Empl. Prac. Cases at 876 ("[t]he language 'employment-related purposes' and

---

[15] Even the EEOC does not go this far. If the court below is correct that pregnant spouses are "women affected by pregnancy," then pregnant non-spouse dependents must also be so characterized. The EEOC, however, expressly sanctions "distinctions based on pregnancy" in employers' health insurance plans. *See* 29 C.F.R. § 1604 (App.) (Question and Answer 21) (an employer is not required to provide health insurance for pregnancy-related medical costs incurred by non-spouse dependents).

'similar in their ability or inability to work' has a commonsense reading that it pertains to women workers only").

If the language of the PDA is at all ambiguous, a review of its legislative history makes its meaning unmistakeable. Congress' sole aim was to enact remedial legislation for female employees and applicants for employment.

B. The PDA Was Remedial Legislation Designed To Ease The Pregnancy-Related Burdens Faced By Women In The Labor Market Or Desiring To Enter The Labor Market.

The PDA was Congress' reaction to *Gilbert*, which involved a Title VII challenge to a disability insurance program maintained by General Electric Company ("GE"). The plaintiffs in that case, female employees of GE, alleged that GE's program, which provided income maintenance for temporary absences from work due to disabilities, violated Title VII's ban on sex discrimination because it did not provide income maintenance for female employees absent from work because of pregnancy. The *Gilbert* Court held GE's plan to be gender-neutral because "an exclusion of pregnancy from a disability-benefits plan is not gender-based discrimination at all." 429 U.S. at 136. It also held that Title VII did not require "greater economic benefits" to be paid "to one sex or the other because of their differing roles in 'the scheme of human existence.'" 429 U.S. at 139 n.17.[16]

---

[16] Because the evidence in *Gilbert* showed that the per capita cost of GE's disability benefits program was slightly higher for female employees than for male employees, GE argued to the district court that including pregnancy coverage would result in discrimination against male employees. Gilbert v. General Elec. Co., 375 F. Supp. 367, 383 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977). In rejecting this argument, the district court noted that such an argument must fail for lack of proof and, in any event, that:

> Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably

To Justice Brennan the result in *Gilbert* conflicted with "the ultimate objective of Title VII, 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [*sexually*] *stratified job environments* to the disadvantage of [women].'" 429 U.S. at 160 (Brennan, J., dissenting) (quoting from *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800 (1973) (brackets in original) (emphasis added)). Justice Brennan also found the result in *Gilbert* contrary to "the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden *women workers* and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." 429 U.S. at 158 (Brennan, J., dissenting) (emphasis added).

The PDA was remedial legislation designed to address Justice Brennan's concern. In his foreword to the official printing of the PDA's legislative history,[17] Senator Williams, the PDA's chief sponsor, described the purpose of the Act:

> The Act provides an essential protection for *working women*. The number of *women in the labor force* has increased dramatically in recent years. Most of *these women are working* or seeking work because of the economic need to support themselves or their families. It is expected that this trend of increasing participation by *women in the workforce* will continue in the future and that an increasing propor-

---

be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. . . . If Title VII intends to sexually equalize employment opportunity there must be this one exception to the cost differential defense.

Id.

[17] Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* [hereinafter, "Leg. Hist."].

> tion of *working women* will be those who are mothers. It is essential that *these* women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy.

Leg. Hist. at iii (emphasis added).[18] When introducing the Conference Report on S.995, the bill that became the PDA, Senator Williams further explained:

> Because of the Supreme Court's decision in the Gilbert case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million *working women*. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy.
>
> In addition to providing protection to working women with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect *pregnant workers*.

124 Cong. Rec. S18,977 (daily ed. Oct. 13, 1978), Leg. Hist. at 200-201 (emphasis added). These statements

---

[18] Senator Williams introduced S.995, the Senate bill which ultimately became the PDA. He also chaired both the Senate Committee on Human Resources and the Senate Subcommittee on Labor to which S.995 was referred. In addition, he was the most active participant in the debate on the Senate floor. His statements are therefore entitled to great weight, since "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1950). *See also* Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964).

Although Senator Williams' foreword is, of course, a postenactment commentary, it is the view of the legislation's chief sponsor, prepared soon after its passage. As this Court said in a similar setting, "[a]lthough we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the [Act's] scope and purpose . . . ." Cannon v. University of Chicago, 441 U.S. 677, 687 n.7 (1979).

correspond fully to the comments made by Senator Williams on the floor of the Senate. When introducing S.995, for example, Senator Williams explained that enactment of his bill was necessary because "[*w*]*orking women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. S4142-43 (daily ed. March 15, 1977), Leg. Hist. at 4.

The remarks of Senator Williams were echoed by those of Congressman Augustus F. Hawkins, the chief sponsor of H.R. 5055 and its successor bill H.R. 6075, the House versions of the bill that eventually became the PDA.[19] When introducing these bills, Congressman Hawkins stated that the proposed legislation would promote progressive laws that had "lifted many of the barriers previously faced by *women entering the labor market*," [20] and was "necessary [because] . . . discrimination against pregnant women is one of the chief ways in which *women's careers* have been impeded and *women employees* treated like second-class employees." [21] In further remarks, Congressman Hawkins explained:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers be treated the same as other employees on the basis of their ability or inability to work.*

124 Cong. Rec. H6863 (daily ed. July 18, 1978), Leg. Hist. at 166 (emphasis added).

Literally dozens of similar remarks made by proponents of the Act on the floor of both the House and

---

[19] H.R. 5055 was identical to S.995. H.R. 5055 was also identical to H.R. 6075 except that the latter added language relating to abortions.

[20] 123 Cong. Rec. E1487 (daily ed. March 15, 1977), Leg. Hist. at 12 (emphasis added).

[21] 123 Cong. Rec. E2095 (daily ed. April 5, 1977), Leg. Hist. at 25 (emphasis added).

the Senate uniformly reinforce the conclusion of the district court in this case: "[t]he clear legislative intent behind the PDA was to 'insure that *working women* are protected against all forms of *employment discrimination* based on sex.'" 510 F. Supp. at 69 (12a (App.)) (emphasis in original) (quoting S. Rep. No. 331, 95th Cong., 1st Sess. 3, Leg. Hist. at 40).[22] In fact, one

[22] These remarks include those of Senator Williams, 123 Cong. Rec. S14,989 (daily ed. Sept. 15, 1977), Leg. Hist. at 62-63 ("central purpose of the bill is to require that *women workers* be treated equally with *other employees* on the basis of their ability or inability to work"); Senator Javits, 124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978), Leg. Hist. at 203 ("bill represents only basic fairness for *women employees*"); Senator Brooke, 123 Cong. Rec. S4144 (daily ed. March 15, 1977), Leg. Hist. at 7 (effect of *Gilbert* "could be devastating" on "*working women* and their families"); Senator Stafford, 124 Cong. Rec. S18,979 (daily ed. Oct. 13, 1978), Leg. Hist. at 204 (bill would remove "major source of discrimination unjustly afflicting *working women* in America); Senator Bayh, 123 Cong. Rec. S4403 (daily ed. March 18, 1977), Leg. Hist. at 21 (bill needed to "help provide true equality for the *working women* of this Nation"); Senator Kennedy, 123 Cong. Rec. S14,992 (daily ed. Sept. 15, 1977), Leg. Hist. at 71 (time has come to guarantee "*working women*" that "sex discrimination in employment is ended"); Senator Biden, 123 Cong. Rec. S15,056 (daily ed. Sept. 16, 1977), Leg. Hist. at 126 (bill needed to discourage abortion since 25 or 39 million *working women* "are there because of the dire economic need to support their families"); Senator Cranston, 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 132 (bill would be a "significant step forward for *working women* and their families" and would advance Title VII goal of "eliminat[ing] those discriminatory practices which pose barriers to *working women . . . in the workplace*"); Senator Culver, 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 132 (bill is "to better ensure equal treatment for *women in the workplace*"); Senator Mathias, 123 Cong. Rec. S4145, S15,058 (daily ed. March 15, Sept. 16, 1977), Leg. Hist. at 8, 134 (*Gilbert* set back "women's efforts for equity in the *job market*"; bill recognizes that "disparate treatment of *pregnant workers* is in reality discrimination on the basis of sex"); Representative Hawkins, 124 Cong. Rec. H6863, H13,495 (daily ed. July 8, Oct. 14, 1978), Leg. Hist. at 168, 207 (genuine equality an illusion if employers are "free to make pregnancy the basis of unfavorable treatment of *working women*"; bill is to "help eliminate the unfavorable treatment of *pregnant working women*"); Repre-

prominent sponsor, Senator Jacob Javits,[23] explained that:

---

sentative Sarasin, 124 Cong. Rec. H13,495-96 (daily ed. Oct. 14, 1978), Leg. Hist. at 208, 209 (bill would "end discrimination against . . . *working women*," and ensure that "rights of *pregnant workers* will be protected"); Representative Green, 124 Cong. Rec. H6865 (daily ed. July 18, 1978), Leg. Hist. at 172 (bill establishes "rights *working women* should have had years ago"); Representative Quie, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 177 (bill "necessary in order for *women employees* to enjoy equal treatment in fringe benefit programs"); Representative Akaka, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 178 ("bill simply requires that *pregnant workers* be fairly and equally treated"); Representative Chisholm, 124 Cong. Rec. H6868 (daily ed. July 18, 1978), Leg. Hist. at 180 ("issue is whether or not we . . . will assure equality at the workplace for *pregnant workers*"); Representative Collins, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 182 (bill "would end widespread abuse of *pregnant women* in the workplace"); Representative LaFalce, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 181 (*Gilbert* disserved "*working women* of childbearing age"; bill would have "all *workers* . . . be treated the same in regard to health insurance coverage, where the issue is not the gender or condition of the employee but *ability to work*"); Representative Corrada, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 178 (bill would remedy *Gilbert* and provide for welfare and job security of working women); Representative Whalen, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 184 (bill would restore Title VII intent "to protect *all workers, pregnant or otherwise*, from sex discrimination"); Representative Tsongas, 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist. at 185 (bill would "go a long way toward assuring women *equality in the job market*"); and Representative Burke, 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist. at 185 ("bill is of great economic importance to all *working women*"). (All emphases added).

[23] Senator Javits was the ranking minority member of the Senate's Human Resources Committee, a member of the Senate's delegation to the Committee of Conference and one of the most active participants in the floor debates. *See* 123 Cong. Rec. S14,991 (daily ed. Sept. 15, 1977), Leg. Hist. at 66; 123 Cong. Rec. S15,049 (daily ed. Sept. 16, 1977), Leg. Hist. at 106; H.R. Rep. No. 1786, 95th Cong., 2d Sess. 1-5 (1978) (Conference Report), Leg. Hist. at 194-98; 124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978), Leg. Hist. at 202.

> This legislation does *not* represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to *pregnant women employees* to the point where it was last year, before the Supreme Court's decision in *Gilbert v. General Electric Corp.*, 426 U.S. 125 (1976).
>
> This approach represents only basic fairness *for employees who become pregnant.*

123 Cong. Rec. S14,991 (daily ed. Sept. 15, 1977), Leg. Hist. at 66-67 (emphasis supplied).

C. The PDA Did Not Change The Law With Respect To Male Employees Or Their Wives.

In construing the PDA to be applicable to male employees' spouses, the court below seemingly ignored the foregoing evidence of Congress' limited intent. It also overlooked the fact that the most authoritative sources of legislative history—the three Committee Reports on the bills which became the PDA [24]—*all* expressly state that the second clause of the PDA would mandate an employer's fringe benefits program to treat women affected by pregnancy equally to "*other employees.*" [25] This uni-

---

[24] Report of the Senate Committee on Human Resources, S. Rep. No. 331, 95th Cong., 1st Sess. (1977), Leg. Hist. at 38-54; Report of the House Committee on Education and Labor, H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978), Leg. Hist. at 147-64; Report of the Committee of Conference, H.R. Rep. No. 1786, 95th Cong., 2d Sess. (1978), Leg. Hist. at 194-98. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969). *See also* Chandler v. Roudebush, 425 U.S. 840, 858 n.36 (1976); United States v. UAW, 352 U.S. 567, 585-86 (1957).

[25] S. Rep. No. 331, 95th Cong., 1st Sess. 14 (1977), Leg. Hist. at 51 (Section-by-Section Analysis); H.R. Rep. No. 948, 95th Cong., 2d Sess. 13 (1978), Leg. Hist. at 159 (Section-by-Section Analysis); H.R. Rep. No. 1786, 95th Cong., 2d Sess. 3 (1978), Leg. Hist. at 196.

form statement of congressional intent should alone suffice to resolve any ambiguity concerning the plain language of the second clause of the PDA—the clause principally relied upon by the court below.

Other passages in the House and Senate Reports confirm this meaning. The House Report explains that the proposed legislation would:

> not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. . . . The bill would simply require that pregnant women be treated the same as *other employees* on the basis of their ability or inability to work.[26]

The Senate Report is explicit in stating that the PDA was not meant to change the law with respect to male employees' wives:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that *the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination.* Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. *Therefore, the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.* . . .
>
> It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar

---

(joint explanatory statement of the Committee of Conference) (emphasis added).

[26] H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978), Leg. Hist. at 150 (emphasis added). *See also* S. Rep. No. 331, 95th Cong., 1st Sess. at 4 (1977), Leg. Hist. at 41 (virtually identical language).

costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. *This bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.*

On the other hand, the question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. *If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.*

S. Rep. No. 331, 95th Cong., 1st Sess. 5-6 (1977), Leg. Hist. at 42-43 (emphasis added).[27]

That the PDA does not reach pregnancy coverage for employees' spouses is also evident in the Reports' estimates of the legislation's anticipated costs to employers. The potential cost of the PDA was the major factor mitigating against its passage. The Committee Reports discounted the potential costs by noting that in several states pregnancy discrimination was already unlawful. Thus, the Senate Report concluded that "the cost of this legislation would not include the provision of *hospital medical benefits* for maternity in States, like New York, where insurance for maternity is mandatory under State

---

[27] The court below chose to quote only the last two paragraphs of this passage, thus ignoring the reference to "existing title VII principles."

law." S. Rep. No. 331, 95th Cong., 1st Sess. 10 (1977), Leg. Hist. at 47 (emphasis added).[28]

Mandatory maternity coverage in New York, as Congress realized, was a product both of judicial interpretation of the state's Human Relations Law, *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884, 14 Fair Empl. Prac. Cases (BNA) 42 (1976), and legislative revision of the state's Workers' Compensation Law.[29] Neither development required employers providing spousal medical benefits to insure against spousal pregnancies. Specifically, *Brooklyn Union Gas*, and each of the New York cases discussed therein, involved only pregnant employees. Similarly, when New York's Disability Benefits Law was amended in 1977, the coverage of the statutory provision by its terms was limited to benefits for pregnant *employees*.[30] The Committee Reports' observation that the PDA would have no fiscal impact on employers doing business in New York is therefore further evidence, conclusive in itself, that Congress did not intend the PDA to impose new obligations with respect to medical benefits for male employees' spouses.[31]

---

[28] *See also* H.R. Rep. No. 948, 95th Cong., 2d Sess. 10 (1978), Leg. Hist. at 156.

[29] S. Rep. No. 331, 95th Cong., 1st Sess. 10 (1977), Leg. Hist. at 47; H.R. Rep. No. 948, 95th Cong., 2d Sess. 11 (1978), Leg. Hist. at 157. *See also* Delta Air Lines, Inc. v. Kramarsky, 485 F. Supp. 300, 302 (S.D.N.Y. 1980), *rev'd in part, vacated in part*, 650 F.2d 1287 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982).

[30] *See* N.Y. Work Comp. Law § 201(9)(A)(B) (McKinney Supp. 1982) ("Disability" means "inability of an *employee*" to work because of nonoccupational injury or sickness; "Disability also includes disability caused by or in connection with a pregnancy.") (Emphasis added.)

[31] In Pennsylvania and Wisconsin, the two other states the House Report cited as having judicially interpreted their fair employment statutes to cover pregnancy discrimination (H.R. Rep. 948, 95th Cong., 2d Sess. 11 (1978), Leg. Hist. at 157), the rulings were also

The cost of covering pregnant employees, not the cost of covering pregnant wives of male employees, was the focus of all debate and discussion on the economic effects of the Act.[32] Even opponents of the Act, who argued that its costs were too high, did not include the enormous costs of dependents' coverage in their estimates.[33] That Congress failed to discuss the staggering additional costs of covering spouses' pregnancies in a debate which focused on the cost of the PDA further underscores the limited congressional intent.

---

developed in the context of female employees. *E.g.*, Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commw. 103, 373 A.2d 126, 20 Fair Empl. Prac. Cases (BNA) 1411, 1412, 1414 (Pa. Commw. Ct. 1977) and cases there cited (pregnant teachers challenged sick leave policy); Ray-O-Vac v. Department of Industry, Labor and Human Relations, 70 Wis. 2d 919, 236 N.W.2d 209, 12 Fair Empl. Prac. Cases (BNA) 64 (1975) (exclusion of pregnancy for purposes of employee disability benefits).

[32] *See Legislation to prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977) [hereinafter, "House Hearings"] at 22-23 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 68 (statement of Laurence Gold, Special Counsel, AFL-CIO), 263 (statement of Mae Walterhouse, President, Federally Employed Women, Inc.), 296-97 (statement of Odessa Komer, Vice President, UAW); *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) [hereinafter, "Senate Hearings"] at 35 (statement of Alexis Herman, Director, Women's Bureau, Employment Standards Administration, Department of Labor), 214-15 (statement of Laurence Gold, Special Counsel, AFL-CIO); 123 Cong. Rec. S4145 (daily ed. March 15, 1977), Leg. Hist. at 7 (remarks of Sen. Brooke); 123 Cong. Rec. S4403-04 (daily ed. March. 18, 1977), Leg. Hist. at 22 (Fact Sheet on S.995); 123 Cong. Rec. S2096 (daily ed. April 5, 1977), Leg. Hist. at 27 (remarks of Rep. Hawkins).

[33] House Hearings at 89 (statement of G. Brockwel Heylin, Labor Relations Attorney, Chamber of Commerce of the United States); Senate Hearings at 177 (statement of Fred T. Thompson, Chairman, Labor Relations Committee, Electronic Industry Association Industrial Relations Council); 123 Cong. Rec. S15,054 (daily ed. Sept. 16, 1977), Leg. Hist. at 121 (remarks of Sen. Helms).

It is also significant that all witnesses to address the question of medical benefits in the House and Senate Hearings did so *only* in the context of benefits for female employees. Their exclusive concern was that this was yet another area where female employees were being discriminated against on the basis of pregnancy.[34] Conversely, no one expressed the view that Title VII should prohibit discrimination against "pregnancy" in general or that male employees were being discriminated against because their pregnant wives did not receive full coverage.[35]

The lack of any intention to extend the PDA to spousal pregnancy benefits is also apparent from the affirmative

---

[34] *See, e.g.*, House Hearings at 45 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 135 (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice), 288-89 (statement of Bella S. Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, 1975); Senate Hearings at 56 (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice), 135 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 150 (statement of Susan Deller Ross, Co-Chair of the Campaign to End Discrimination Against Pregnant Workers), 184 (statement of New York State Sen. Carol Bellamy), 293 (statement of Toni Sterling, Member, Local 65, United Steelworkers of America), 301 (statement of Roberta Woods, Chairperson, United Steelworkers of America, District 31, Women's Caucus). *See also* 123 Cong. Rec. S14,990 (daily ed. Sept. 15, 1977), Leg. Hist. at 65 (remarks of Sen. Williams).

[35] In contrast to the relative silence of Congress on this subject during hearings and debates on the PDA bills, the question of dependents' benefits provoked great controversy when the EEOC's Questions and Answers were published for public comment. The EEOC's Introduction to its Final Interpretive Guidelines On Sex Discrimination acknowledges that "[a] majority of [all] the comments [concerning the EEOC's Interim Guidelines and the attached Questions and Answers] questioned the appropriateness of the Commission's answer to Question 21." 44 Fed. Reg. 23,805 (1979). This reaction suggests, first, that similar controversy would have occurred in Congress had the EEOC's position been considered therein and, second, that the EEOC's view is in fact a novel one not previously endorsed by Congress.

comments concerning the specific question of dependents' benefits. One particularly revealing dialogue occurred between Senator Williams and Senator Orrin Hatch, a minority member of the Senate Human Resources Committee:

> Mr. HATCH: . . . *The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad,* and is not limited in terms of employment. It does not even require that the person so affected be pregnant.
>
> *Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. . . .*
>
> *Could the sponsors clarify exactly whom that phrase intends to cover?*
>
> . . . .
>
> MR. WILLIAMS: If there is any ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than that pregnancy that relates *to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.
>
> Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of a female employee.
>
> Mr. WILLIAMS: Exactly, it does not.
>
> Mr. HATCH: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, what it means is that *this act only applies to the particular*

woman who is actually pregnant, who is an employee and has become pregnant after her employment?

Mr. WILLIAMS: *Exactly.*

123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80 (emphasis added).

The intention to protect only female employees and applicants in fact was clear from the very beginning of the legislative process. In a colloquy with Allen Lazarescu of the American Council of Life Insurance and the Health Insurance Association of America, Senator Williams emphasized that medical expense benefits, like disability benefits, would go *only* to pregnant female employees:

Mr. LAZARESCU: . . . [T]he figures we have are $0.6 billion for disability and $1 billion for medical expense.

So I will pick that up later.

Now, the cost of the benefits to be provided as a result of S.995——.

Senator WILLIAMS: By the way, and just to spell it out, what number do you use for women in the work force that would be covered?

Mr. LAZARESCU: Well, I am not quite sure I understand the question.

Senator WILLIAMS: This deals with pregnancy. *It only deals with women employees.*

Now, how many are you talking about?

Senate Hearings at 402 (emphasis supplied).

D. The Remarks Of Senators Bayh And Cranston Are Entitled To No Deference.

The court below, basically ignoring the foregoing legislative history, relied instead on two isolated remarks made on the floor of the Senate by Senators Bayh and Cranston. What the court failed to understand, as an analysis of the senators' remarks makes clear, is that each senator was advancing his own idiosyncratic (and erroneous) view of Title VII law prior to passage of the PDA, rather than describing the scope of the PDA itself.

The remarks relied upon by the court below are as follows:

> [*T*]*he legislation will not require that companies provide the same pregnancy coverage for the dependents of male employees that it provides to its female employees.* There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. *While it is difficult to second-guess the courts,* I feel that the history of sex discrimination cases under the *14th amendment* in addition to *previous interpretations of the Title VII regulations relating to the treatment of dependents* will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

123 Cong. Rec. S15,037 (daily ed. Sept. 16, 1977), Leg. Hist. at 75 (remarks of Sen. Bayh) (emphasis added).

> When the [Senate Committee on Labor and] Human Resources . . . considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents, and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.
>
> Mr. President, I would like to express for the record *my own view* that such a plan would indeed be discriminatory, and *would be prohibited by the title VII sex discrimination ban.* A plan having such anti-

> family ramifications would be totally inimical to the values we hold so dear and which we, in these times, are attempting to strengthen.

123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 131 (remarks of Sen. Cranston) (emphasis added).

The remarks of Senator Bayh, based on his feelings about the scope of the fourteenth amendment and previous interpretations of Title VII regulations, are not part of the legislative history of the PDA at all. Rather, they express his personal views about the reach of Title VII without the PDA. Thus, they are perfectly consistent with the view, expressed in the Senate Report, that the PDA does not affect the question of dependents' benefits. Senator Cranston, similarly, was stating his "own view" on Title VII prior to enactment of the PDA.

Properly viewed, these remarks are isolated post-hoc interpretations of the scope of Title VII prior to its amendment by the PDA. As such, they are entitled to no deference. *See Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 714 (1978).

Moreover, even if viewed as opinions on the reach of the PDA itself, the senators' isolated remarks can have but little weight. Although each senator was among thirty "co-sponsors" of S.995, neither was a member of the Senate's delegation to the House-Senate Conference and neither was even a member of the subcommittee before which the hearings on S.995 were held. By contrast, the bill's principal sponsor, Senator Williams, made it clear that only pregnant workers would be protected by the bill. These isolated remarks, then, coming from rela-

tively insignificant proponents of the bill, and contradicted by the more authoritative views expressed by the bill's principal sponsors and all other legislative history, including the Senate Report, cannot be deemed as reliable indicia of congressional intent.[36]

E. The PDA Overturned *Gilbert* Only With Respect To Pregnancy-Related Title VII Claims Made By Female Employees And Female Applicants For Employment.

Gilbert's holdings were two. First, that "an exclusion of pregnancy from a disability-benefits plan is not gender-based discrimination at all." 429 U.S. at 136. *See also Manhart*, 435 U.S. at 715. Second, that "[t]he District Court was wrong in assuming . . . that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" 429 U.S. at 139 n.17. *See also Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977).

The first of these holdings was affected by the PDA's first clause. As amended by that clause, § 703(a)(1) makes it unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . [pregnancy]." Accordingly, an exclusion of pregnancy from a disability-benefits plan is now unlawful if it results in a difference in compensation for the pregnant individual.

---

[36] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (even the remarks of the legislation's sponsor cannot control if they conflict with the Committee reports and statements of other congressmen); Zuber v. Allen, 396 U.S. at 186 ("Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report"); EEOC v. Lockheed Missiles & Space Co., 680 F.2d at 1245-46; EEOC v. Joslyn Mfg. Co., 524 F. Supp. at 1143-44.

The above-described second holding, unaffected by the PDA's first clause, was overturned by the PDA's second clause, which requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes, *including the receipt of benefits under fringe benefit programs*, as other persons not so affected but similar in their ability or inability to work . . . ." Because of the second clause, regardless of cost, an employer may not exclude employee pregnancies from the scope of an otherwise comprehensive fringe benefit plan for its employees.

In enacting the PDA, Congress intended to alleviate the pregnancy-related burdens faced by women in the labor force and women desiring to enter the labor force. It was Congress' view that if pregnancy, a condition unique to women, increases the cost of an employer's medical insurance plan, the employer must bear that cost for its employees precisely because of the female's "differing role in the scheme of human existence." *Gilbert*, 429 U.S. at 139 n.17.

The EEOC argues that if the PDA extends benefits only to female employees and applicants for employment, "Congress, in a simple definitional amendment to Title VII, has mandated special, preferential treatment contrary to the basic principles of the underlying law." R.Br. at 9. This is precisely what Congress did. Only women can become pregnant. Thus, only women face pregnancy-related employment disadvantages. Had Congress wished to require employers' medical insurance plans to cover the pregnancies of male employees' spouses, it would have required fringe benefit plans covering the pregnancies of female employees to also cover the pregnancies of the wives of male employees. This the Congress expressly chose not to do.[37] Instead, Congress

---

[37] "It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the

enacted legislation exclusively for the benefit of the female worker.[38]

The language chosen by Congress simply does not support a finding that the PDA prohibits discrimination against pregnancy itself. If the language of the PDA were insufficient to indicate Congress' limited intent, moreover, the history of the PDA, dismissed without discussion by the court below as "some legislative history," conclusively establishes that the PDA's sole aim is to enhance employment conditions for female employees and applicants for employment.[39] Congress simply was not concerned about male employees or their wives.

---

maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect." S. Rep. 331, 95th Cong., 1st Sess. 6 (1977), Leg. Hist. at 43.

[38] This Court has routinely upheld legislation enacted for the benefit of a historically disadvantaged group. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979); Califano v. Webster, 430 U.S. 313, 318 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). *See also* Miss. Univ. for Women v. Hogan, 102 S.Ct. 3331, 3340 (1982).

[39] *See, e.g.*, General Building Contractors Ass'n, Inc. v. Pennsylvania, 102 S. Ct. 3141, 3148, 3149 (1982) (reach of 42 U.S.C. § 1981 to be determined in light of the " 'events and passions of the time' in which the law was forged"; scope of section is limited to intentional practices, which were the "immediate evils with which the [enacting] Congress was concerned"); United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979) (voluntary affirmative action program for blacks lawful despite Title VII's racial discrimination ban in light of legislative history focusing on the plight of black workers and indicating desire to avoid undue federal regulation of private business). *See also Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting) ("discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals' ").

II. THE DISTRICT COURT CORRECTLY DECIDED THAT QUESTIONS AND ANSWERS 21 AND 22 ARE CONTRARY TO LAW AND ENTITLED TO NO JUDICIAL DEFERENCE.

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (citations omitted). To be valid, regulations must therefore "be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977).

Numerous rules and guidelines promulgated by the EEOC have been struck down by the courts in reliance upon the basic principles set forth above. As the Court recently stated, the EEOC's " 'interpretation' of the statute cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980). *See also, e.g., Gilbert*, 429 U.S. at 141-45; *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973); *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 743 (S.D. N.Y. 1980).[40] The weight to be given to any particular EEOC interpretation varies with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gilbert*, 429 U.S. at 142 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[41]

---

[40] *Espinoza* is especially apposite to the case at bar. In holding that Title VII did not make it illegal "to discriminate on the basis of citizenship or alienage," the Court stated that deference to EEOC guidelines "must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question." 414 U.S. at 94.

[41] The EEOC has no authority to promulgate rules or regulations pursuant to Title VII. *See Gilbert*, 429 U.S. at 141; Albemarle

In *Gilbert*, this Court declined to give deference to a regulation promulgated by the EEOC several years after the enactment of Title VII and without reference to any intervening source of legislative history. 429 U.S. at 140-44.[42] It found that regulation to be other than a contemporaneous interpretation of Title VII and to contradict both the EEOC's more nearly contemporaneous interpretations of Title VII and regulations issued under the Equal Pay Act, 29 U.S.C. § 206(d). 429 U.S. at 140-44. The EEOC's interpretations on the issue involved in this case suffer from these faults and more.

Since it first published its sex discrimination guidelines in 1972, the EEOC has maintained that, regardless of cost, an employer must provide the same level of benefits for female employees as for the spouses of male employees, and the same level of benefits for male employees

---

Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Accordingly, EEOC guidelines are no more than the EEOC's opinion of what Title VII means. *See, e.g.*, Ass'n of Am. Railroads v. United States, 603 F.2d 953, 962 (D.C. Cir. 1979). Its Guidelines, therefore, are to be accorded less weight than that given to administrative regulations which Congress has declared shall have the force of law or to regulations which under an enabling statute may themselves supply the basis for imposition of liability. *See Gilbert*, 429 U.S. at 141.

[42] In 1972, the EEOC had taken the following position on the meaning of Title VII:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

37 Fed. Reg. 6836 (1972), *reprinted in* 29 C.F.R. § 1604.10(b) (1975) (Pet. 5 n.2).

as for the spouses of female employees. 29 C.F.R. § 1604.9(d) & (e) (37 Fed. Reg. 6836 (1972)).[43]

In enacting the PDA, Congress expressly rejected the approach of comparing employees and spouses:

> It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This bill would not mandate that women dependents be compared with woman employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

S. Rep. No. 331, 95th Cong., 1st Sess. 6 (1977), Leg. Hist. at 43.

Undaunted by this expression of congressional intent, when it published in the Federal Register its "Interim Amendments to Guidelines on Discrimination Because of

---

[43] Prior to enactment of the PDA, the Shipyard's Plan complied with these regulations. It provided exactly the same level of pregnancy benefits for its female employees as for the spouses of its male employees. Moreover, it appears that the Shipyard's Plan complies with 29 C.F.R. § 1604.9(d) even today. That regulation, designed solely to protect employees, apparently does not require an employer to provide the same level of benefits for male employees' spouses that it provides for female employees:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

29 C.F.R. § 1604.9(d).

Sex" with "Questions and Answers concerning the Pregnancy Discrimination Act," the EEOC included the following Question and Answer:

> 21. Q. Must an employer provide health insurance for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?
>
> A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.
>
> But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

44 Fed. Reg. 13,280-81 (1979).

When it published its "Final Interpretive Guidelines" and final "Questions and Answers" on the PDA, the EEOC noted that "[a] majority of the comments questioned the appropriateness of the Commission's answer to Question 21 . . . ." 44 Fed. Reg. 23,804 (1979).[44] Despite this criticism, Question and Answer 21 appeared unchanged in the final Questions and Answers. In addition, "to provide additional guidance to interested parties" (44 Fed. Reg. 23,805 (1979)), the EEOC reiterated its position in the following Question and Answer:

> 22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

---

[44] The EEOC's Interim Guidelines and Questions and Answers on the PDA became effective on March 9, 1979. 44 Fed. Reg. 13,278 (1979). The EEOC nevertheless solicited comments from the public for a period of 30 days thereafter. 44 Fed. Reg. 13,279 (1979).

> A. No. . . . However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. . . .

44 Fed. Reg. 23,807 (1979).[45]

In explaining its answers to Questions 21 and 22, the EEOC acknowledged that the PDA itself did not address the question of benefits for employees' spouses and that, "The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents." 44 Fed. Reg. 23,804 (1979). Thus, it explained, "The Commission, being responsible for interpreting and implementing Title VII, utilized Title VII principles to arrive at the position reached on the dependent question." *Id.* Those "Title VII principles" purportedly were the following:

> The underlying principle of Title VII is that applicants for employment or employees be treated *equally* without regard to their . . . sex . . . . This equality of treatment encompasses the receiving of fringe benefits made available in connection with employment. Title VII does not require employers to provide the same coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for the pregnancy-related costs of its female employees. However, if an employer makes available to female employees insurance which covers the costs of all of the medical conditions of their spouses, but provides male employees with insurance coverage for only *some* of the medical conditions (i.e., all but

---

[45] The district court held Questions and Answers 21 and 22 invalid. The court below did not explain its reversal of that decision even though its view appears to be that an employer's medical benefits plan must treat all pregnancies alike, not that such a plan must treat all spouses alike.

> pregnancy-related expenses) of their spouses, male employees are receiving a *less favorable fringe benefit package*. This view was explicitly supported by Senators Bayh and Cranston, 123 Cong. Rec. S15,037, S15,058 (daily ed. Sept. 26, 1977), and not specifically opposed.

44 Fed. Reg. 23,804-05 (1979) (emphasis added).

This explanation ignores entirely this Court's opinion in *Gilbert*, which clearly establishes the only pertinent "Title VII principles." In addition, it presumes too much. First, it presumes that Title VII requires a fringe benefit plan to provide "equal benefits" for employees of both sexes regardless of cost. The EEOC's decision to totally disregard employer costs in assessing the amount of "compensation" an employee receives from a fringe benefit plan is an anomaly. Other agencies charged with the administration of equal employment laws deem fringe benefit plans to be lawful if employer contributions are equal for employees of both sexes.[46]

More importantly, the EEOC's explanation presumes that providing pregnancy-related insurance benefits for male employees' spouses is necessary to ensure "equal"

---

[46] Regulations promulgated by the Department of Health and Human Services pursuant to Title IX of the Civil Rights Act, for instance, prohibit a recipient of federal funds from administering a fringe benefit plan "which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex." 45 C.F.R. § 86.56(b)(2). The Department of Labor's Office of Federal Contract Compliance Programs similarly requires either equal contributions or equal benefits. 41 C.F.R. § 60-20.3(c). The regulations issued by the Department of Labor's Wage and Hour Administrator pursuant to the Equal Pay Act are to the same effect. 29 C.F.R. § 800.116(d) ("If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provision will result . . . even though the benefits which accrue to the employees in question are greater for one sex than for the other"). This Court has endorsed the view of the Wage and Hour Administrator. *See Gilbert*, 429 U.S. at 144-45.

fringe benefits for male and female employees. This presumption was rejected in *Gilbert*, 429 U.S. at 139. *See also Satty*, 434 U.S. at 141; *Geduldig v. Aiello*, 417 U.S. 484 (1974). Indeed, it may be argued that an employer which even-handedly covers the health risks incurred by employees' spouses of both sexes and, in addition, provides coverage for the pregnancy-related expenses of the spouses of male employees therby "favors" male employees by providing them with a benefit which is denied to female employees by virtue of the simple fact that their spouses cannot become pregnant.[47]

In any event, what § 703(a)(1) of Title VII prohibits is unequal "compensation." It is readily apparent that a difference in take-home pay, as was present in *Manhart*, represents a difference in "compensation." It is not at all apparent, however, that male employees receive less "compensation" than female employees if the spouses of both are equally covered for all risks under a medical insur-

---

[47] In the context of a health insurance plan, it is simply impossible to determine whether male or female employees receive a "less favorable fringe benefit package." For example, the average short-stay in a non-federal hospital for a male is 7.7 days, whereas the average short-stay in a non-federal hospital for a female is 6.9 days. Unpublished data, *National Hospital Discharge Survey*, National Center for Health Statistics, 1981. Accordingly, under the EEOC's "favorable fringe benefit package" analysis, the Shipyard's Plan, by covering the full cost of hospital room charges for employees of both sexes, to a maximum of 120 days, may be said to favor male employees. Moreover, as of November 1982, 66.3% of all married males in the United States over the age of 16, but only 20% of all married females in the United States over the age of 16 had unemployed spouses. *Employment and Earnings*, Bureau of Labor Statistics, Dec. 1982. Thus, using the EEOC's analysis, the Shipyard's Plan, which provides that the medical expenses of a spouse employed elsewhere are covered first by the spouse's medical insurance plan, if any, "favors" male employees.

This analysis shows the absurdity of the EEOC's argument. Taken to its logical end, this analysis would lead to the conclusion that the Shipyard's Plan, by excluding coverage for, *e.g.*, eyeglasses, is unlawful under Title VII, if statistics show that more persons of one sex or the other in fact wear eyeglasses.

ance plan which does not cover the pregnancy-related medical expenses of the male employee's spouse—"an *additional* risk unique to women." *See Gilbert*, 429 U.S. at 139 (emphasis in original). Thus, as this Court noted in *Gilbert*:

> [T]he failure to compensate . . . for [the] risk [of pregnancy] does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other.

429 U.S. at 139-40. *See also Satty*, 434 U.S. at 141 ("No evidence was produced [in *Gilbert*] to suggest that men received more benefits . . . than did women; both men and women were subject generally to the disabilities covered and presumably drew similar amounts from the insurance fund").

In an attempt to support the position set forth in Questions and Answers 21 and 22, the EEOC now argues that the position there taken is mandated, not by "existing Title VII principles," but by the PDA itself. R.Br. 2. This position is flatly contradicted by the EEOC's explanation of those Questions and Answers in the Federal Register, which is the EEOC's more nearly contemporaneous interpretation of the PDA.[48]

As no more than novel and extremely tardy interpretations of Title VII of the Civil Rights Act of 1964, the EEOC's answers to Questions 21 and 22 share the faults

---

[48] The Ninth Circuit in *Lockheed* concluded that "EEOC's answer to its Question 21 is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles." 680 F.2d at 1246 n.3. The EEOC's answer to Question 22, being in pertinent part a restatement of its answer to Question 21, necessarily shares the same status.

of the EEOC regulation that this Court discounted in *Gilbert*, 429 U.S. at 140-45. First, they obviously cannot command the respect normally accorded to contemporaneous interpretations. *Id.* at 142. Second, they flatly contradict the EEOC's earlier interpretations of Title VII. *Id.* at 143-44.[49] Third, in promulgating Answers 21 and 22 the EEOC inexplicably ignored this Court's decision in *Gilbert* and relied on no new source of legislative history that had been discovered in the 14 years intervening since the enactment of Title VII. *Id.* at 144-45. Fourth, in measuring "compensation" without regard to employer costs, the EEOC differs from other agencies charged with the enforcement of employment-related sex discrimination laws. *Id.* at 145. *See* note 46 *supra*.

Because of the second clause of the PDA, employers who provide medical insurance coverage for their employees now must bear the cost of covering the pregnancy-related medical expenses of their female employees to the same extent that they cover medical expenses of employees generally. By promulgating Questions and Answers 21 and 22, the EEOC seeks to require employers to bear the yet additional cost of covering pregnancy-related medical

---

[49] Indeed, for many years the EEOC permitted the denial of pregnancy benefits even to female employees. In late 1966, for example, the General Counsel of the EEOC issued opinion letters stating the EEOC's position to be that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such exclusion would not . . . be discriminatory." General Counsel Opinion Letter November 1, 1966. E.P.G. (CCH) ¶ 17,304.49. The EEOC affirmed this position in a 1969 decision, CCH EEOC Dec. (1973) ¶ 6084 (Dec. No. 70-360 (1969)), only to summarily reverse itself fifteen months later. CCH EEOC Dec. (1973) ¶ 6221 (Dec. No. 71-14 74 (1971)). *See Gilbert*, 429 U.S. at 143-44.

If any "existing Title VII principles" supported the EEOC's present view of the law, the EEOC surely would be able to point to cases predating the PDA in which that issue was addressed. Significantly, no such cases exist. All pre-PDA cases addressing pregnancy discrimination deal only with the denial of benefits to female employees. That there were many such cases makes the total absence of cases on dependents' pregnancies all the more conspicuous.

expenses of their male employees' spouses to the same extent that they cover medical expenses for employees' spouses generally. The EEOC once correctly acknowledged that this result is not mandated by the PDA. Nor can it be found that this result was mandated by principles of Title VII in existence prior to passage of the PDA—Questions and Answers 21 and 22 are directly contrary to the principles of Title VII set forth in this Court's decision in *Gilbert*. Accordingly, the district court correctly concluded that Questions and Answers 21 and 22 are contrary to law and entitled to no judicial deference.

III. THE DISTRICT COURT CORRECTLY DECIDED TO DISMISS THE EEOC'S COMPLAINT.

The EEOC's complaint alleges that a health insurance plan which limits reimbursable hospital claims for a risk which can be incurred only by a female spouse constitutes discrimination against male employees with respect to their compensation. As noted earlier, the PDA is plainly inapplicable to this allegation.[50] Indeed, as recognized by Judge Wright, specially concurring in *Lockheed*, it is irrelevant that pregnancy benefits are involved at all:

> What we must decide is whether Lockheed denies its male employees a health benefit plan equivalent to that given its female employees and, if so, whether the denial is based on impermissible sex discrimination. For our purposes, it is irrelevant that dependents' pregnancies are the excluded risk. *The exclusion could be breast cancer. Our focus is properly on the effect of the exclusion on the employee because it is his compensation and terms of employment that Title VII protects from unlawful discrimination.*

680 F.2d at 1247 (Wright, J., specially concurring) (emphasis added). Although the question presented is novel, the guiding principles are well-established.

---

[50] *See* pp. 10-12, 29-30, *supra*.

The Court has decided three cases involving claims made by female employees that their employers violated § 703(a)(1) by maintaining fringe benefit plans which discriminated against them with respect to their compensation because of their sex—*Manhart*, *Satty*, and *Gilbert*. Two of these cases—*Satty* and *Gilbert*—involved claims that an employer violated § 703(a)(1) by treating pregnancy differently than other medical conditions in a medical benefits plan. The Court rejected both of these claims because, *inter alia*, there was no evidence to support a finding tht the financial benefits of either plan "worked to discriminate against any definable group or class in terms of aggregate risk protection derived by the group or class from the program." *Satty*, 434 U.S. at 144; *Gilbert*, 429 U.S. at 138. *See also Geduldig*, 417 U.S. at 496. However, it upheld the claim made in *Manhart*, which involved a pension plan whereby female employees and male employees received unequal take home pay because their employer, using sex-based mortality tables, required them to make unequal contributions to a pension fund. Applying the principles of *Gilbert*, *Satty*, and *Manhart* to the instant case demonstrates that there is no basis for a finding that the Shipyard's Plan discriminates on the basis of sex with respect to compensation.

The *Manhart* Court emphasized that a fringe benefit plan may be found to be gender-based if it classifies employees into "two groups . . . composed entirely and exclusively of members of the same sex." 435 U.S. at 715. At the same time, it distinguished *Gilbert* by explaining that the employee groups created in that case—pregnant women and all other persons—did not result in a sex-based classification. *Id.* The Shipyard's Plan, like the employee benefit plan at issue in *Gilbert*, divides employees into one group which is all of one sex—in this case, male employees with pregnant spouses who are entitled to benefits under the Shipyard's Plan—and another group which includes employees of both sexes. In this case, the second group includes unmarried male employees, male employees with non-pregnant spouses, married male employees whose

spouses' pregnancy-related hospitalization costs are covered by their own employers,[51] and all female employees. The Plan thus is not facially discriminatory under this method of analysis.

Another method of analysis is suggested in *Gilbert*. The *Gilbert* Court found GE's disability benefits plan to be facially neutral because, "The 'package' going to relevant identifiable groups we are concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" 429 U.S. at 138-39. In this respect, the Shipyard's Plan is not facially neutral. Because it provides risk protection for pregnancy-related medical expenses, the Plan necessarily covers female employees for a risk that male employees can never incur. It also covers male employees' spouses for a risk that female employees' spouses can never incur. Under this method of analysis, the Plan favors the male employee and his spouse. Only a male employee has the potential of receiving reimbursements for a medical risk peculiar to his spouse. Because of the biological differences between the sexes, the female employee can never be reimbursed for a similar spousal medical risk. Accordingly, the EEOC's position is not furthered by the equal risk protection analysis utilized in *Gilbert*. Nor would its position be assisted materially by this analysis if it had alleged that the Shipyard's Plan discriminates against female employees with respect to their compensation.

The Shipyard's Plan, like most medical insurance packages, "covers some risks, but not others." *See* pp. 2-4 *supra*. *See also Gilbert*, 429 U.S. at 138. It excludes or limits reimbursements for a number of medical risks.

---

[51] Under the Shipyard's Plan, expenses incurred by a spouse employed elsewhere are to be paid first by the spouse's group plan, if any. *See* 34a, 47a-48a (App.).

Id. Moreover, no risk is "fully" covered. *See* pp. 2-4, *supra*. Because the Shipyard's Plan limits the extent to which it will reimburse male employees for hospitalization costs incurred by their spouses in the event of pregnancy, the EEOC contends that the Plan discriminates against male employees with respect to their compensation. There simply is no proof of this.

In terms of financial benefits, the Shipyard's Plan is worth different amounts to each employee. A single employee no doubt receives fewer financial benefits from this Plan than a married employee with dependents. Similarly, an employee with an unhealthy family undoubtedly receives greater financial benefits than one with a healthy family. As the Court recognized in *Manhart*, when insurance risks are grouped, the better risks always subsidize the poorer risks:

> Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair.

435 U.S. at 710 (footnote omitted). A healthy employee who never makes a reimbursable claim undoubtedly would rather have a higher wage than the medical insurance provided by the Shipyard's Plan. By giving up that increased wage, he is subsidizing the health costs of employees who utilize the Plan to its fullest extent. It is for this very reason that the Court in *Gilbert* concluded that "it is impossible to find any gender-based discriminatory effect in [such a] scheme simply because women disabled as a result of pregnancy do not receive benefits." 429 U.S. at 138.

The compensation an employee receives from an employer's health insurance plan may be measured in sev-

eral ways. In the context of a pension plan, this Court recognized in *Manhart* that both contributions and financial benefits are "compensation" within the meaning of § 703(a)(1). 435 U.S. at 712 n.23. The Court in *Gilbert* made a similar observation. In rejecting the EEOC's then-current view of Title VII's requirements, the Court endorsed the opinion of the Wage and Hour Administrator that no sex-based difference in compensation would be found to result from the operation of a plan for insurance or similar benefits for employees where either equal contributions are made or equal financial benefits are received. 429 U.S. at 144-45.[52]

Viewed from this perspective, the Shipyard's Plan cannot be found to violate Title VII's prohibition on discrimination with respect to compensation because of sex. Shipyard employees make no contributions to the Plan. Nor does the Shipyard make "contributions" to a third party to obtain health insurance for employees. As a self-insurer, its per capita costs vary solely with the number and amount of reimbursable claims made. In no event can any difference in those per capita costs be construed to be based on the factor of sex.

Nor can any difference in financial benefits be deemed to be based on the factor of sex. Each employee's actual financial benefit from the Plan varies solely with the number of reimbursable claims he or she submits. *See Kimberly-Clark Corp. v. Labor & Industry Review Commission*, 95 Wis. 2d 558, 291 N.W. 2d 584, 23 Empl. Prac. Dec. (CCH) ¶ 30,905 at 15,687-88 (Wis. Ct. App. 1980) (any disparity in compensation resulting from the inclusion of income maintenance for female employees who incur pregnancy-related disabilities is based on the factor of actual disability, not on the factor of sex).

---

[52] *See also Manhart*, 435 U.S. at 717-18 ("Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let such retiree purchase the largest benefit which his or her accumulated contributions could command in the open market").

Thus, an employee's "compensation" from the Shipyard's Plan, whether measured by the Shipyard's costs or by the employee's actual receipts, cannot be found to violate Title VII. Both measures of compensation are based solely on the factors of actual illness, injury, or other reimbursable incident.

A third possible measure of the "compensation" derived from the Shipyard's Plan is the "value" of the Plan to the employee. The subjective "value" of the Plan will depend on factors wholly unrelated to sex. A single employee most likely does not want the full range of coverage provided for him by the Shipyard's Plan. If that individual purchased a health insurance policy from an independent insurance company, it is unlikely that he would select the same kind of policy selected by an employee who is responsible for the support of one or more dependents. However, the objective "value" of the Shipyard's Plan is equal for all employees. It is the cost of obtaining a policy identical in scope to the Shipyard's Plan.[53] If this value varies at all, it varies only by the

---

[53] *See* Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287, 1298 n.16 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982) ("[B]enefits payable in the future have no present value, being a mere expectancy, contingent upon the occurence of an insured risk. Therefore, in a plan where the employer bears the full cost of providing benefits, the value of the plan is equal to the cost to the worker of purchasing equivalent coverage directly from an insurer"); Benston, *The Economics of Gender Based Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 503 (1982) ("[T]he actual amounts received do not measure the benefit received by an employee who is granted insurance as a fringe benefit. . . . The value of the insurance fringe benefit to employees depends not on its cost to the employer but on its subjective worth to the individual recipient. This is the situation for any compensation not paid in cash. As an initial approximation, the value of a fringe benefit to an employee seems to equal the number of dollars he or she would pay to purchase the same benefit on the open market").

amounts charged by different insurance carriers for identical policies, also a factor other than sex.[54]

In concluding that the Shipyard's Plan "results in less complete medical coverage for male employees with spouses than for female employees with spouses," the court below apparently agreed with the EEOC's theory that unequal "compensation" may be presumed in this case because a male employee "must finance himself some of the expenses resulting from his spouse's disabilities." R.Br. at 7. Under the Shipyard's Plan, a female employee also must pay some of the expenses resulting from her spouse's disabilities. Thus, a female employee whose spouse is in the hospital for over 120 days must pay "some of the expenses resulting from [her] spouse's disabilities." She must pay for all expenses incurred by her spouse as the result of, *inter alia*, oral surgery. Moreover, the risk of incurring out-of-pocket expenses for spouses' pregnancies does not fall on male employees as a class—even those with pregnant spouses likely to be eligible for reimbursements under the Shipyard's Plan may never incur pregnancy-related hospital costs in excess of $500.

Unequal compensation could not be found in this case, moreover, even if male employees alone had to pay some amount in the event of a particular spousal disability. Compensation is what the employee receives from his employer. It has nothing to do with what he must pay

---

[54] The employer in *Manhart* argued that requiring equal contributions from its male and female employees would result in an unlawful disparate impact because, as a class, male employees would receive fewer total pension benefits. 435 U.S. at 710-11 n.20. Noting that "each retiree's total pension benefits are ultimately determined by his actual life span," the Court stated that "any differential in benefits paid to men and women in the aggregate is thus 'based on [a] factor other than sex,' and consequently immune from challenge under the Equal Pay Act." *Id. See also County of Washington v. Gunther*, 101 S. Ct. 2242 (1981). The Shipyard submits that the Equal Pay Act, 29 U.S.C. § 206(d), also bars any disparate impact claim in this case.

in particular circumstances. Thus, as the Court explained in *Gilbert*:

> Absent proof of different values, the cost to "insure" against the risk is, in essence, nothing more than extra compensation to the employee, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, they illogically also suggest that the present scheme does violate Title VII because: "A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability." Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription of discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. at 139 n.17.

The EEOC's argument in this case, like the one rejected in *Gilbert*, is totally illogical. The EEOC expressly sanctions medical insurance plans which do not cover spouses. *See* 29 C.F.R. Part 1604 (App.) (Question and Answer 21). If it is lawful for an employer to maintain a plan whereby a male employee must

pay the full amount in the event of his spouse's pregnancy, it cannot be unlawful for the Shipyard to maintain a plan whereby the male employee *may* have to pay *some* amount. "To hold otherwise would endanger the commonsense notion that an employer who has no . . . [health insurance] program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon another." *Gilbert*, 429 U.S. at 139-40.

The court below therefore clearly erred in reversing the district court's decision to dismiss the EEOC's complaint. That the EEOC's claim is made on behalf of male employees who claim to have been "affected by pregnancy" cannot alter the fact that no § 703(a)(1) violation may be found absent proof that these male employees have been discriminated against "with respect to [their] compensation." As the EEOC, which alleges only a *per se* violation of § 703(a)(1), has no intention of offering any such proof, the decision to dismiss the complaint was proper in all respects.

CONCLUSION

Based on the foregoing points and authorities, the Shipyard requests that the decision of the court below be reversed.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

SEYFARTH, SHAW,
FAIRWEATHER
& GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400

ANDREW M. KRAMER
Counsel of Record
GERALD D. SKONING
DEBORAH CRANDALL
DAVID D. KADUE
Attorneys for Petitioner

Dated: January 20, 1983

Office-Supreme Court, U.S.
FILED
MAR 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-411

In the Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL N. MARTINEZ
Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether a company discriminates against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing a medical insurance plan for workers and their families that covers spouses' maternity costs less favorably than costs resulting from all other spousal illnesses or injuries.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute and regulation involved	2
Statement	2
Summary of argument	7
Argument:	
I. Title VII prohibits employers from discriminating against males in providing spousal medical benefits	8
II. The PDA applies to all Title VII claims involving pregnancy	11
A. The plain language of the statute applies to all Title VII claims involving pregnancy	11
B. The legislative history confirms the plain meaning of the PDA	16
III. The contemporaneous administrative interpretation of the PDA is entitled to substantial judicial deference	36
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Anderson v. *Upper Bucks County Area Vocational Technical School*, 30 Pa. Comm. 103, 373 A.2d 126	34
Arizona v. *California*, 373 U.S. 546	30
Baltimore & O.C.T.R.R. v. *United States*, 583 F.2d 678, cert. denied, 440 U.S. 968	37
Brooklyn Union Gas Co. v. *New York State Human Rights Appeal Board*, 41 N.Y. 2d 84, 359 N.E. 2d 393, 390 N. Y. S. 2d 884	33, 34

Cases—Continued: Page

Brown v. *GSA*, 425 U.S. 820 29
Califano v. *Goldfarb*, 430 U.S. 199 9
Chandler v. *Roudebush*, 425 U.S. 840 13
Chastang v. *Flynn & Emrich Co.*, 541 F.2d 1040..... 8
Comm's v. *Aragon*, 329 U.S. 143 36
County of Washington v. *Gunther*, 452 U.S. 161..... 17, 36
EEOC v. *Associated Dry Goods*, 449 U.S. 590..... 37
EEOC v. *Colby College*, 589 F.2d 1139 8
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 37
Faraca v. *Clements*, 506 F.2d 956, cert. denied, 422 U.S. 1006 8
Fitzpatrick v. *Bitzer*, 519 F.2d 559, rev'd, 427 U.S. 445 8
Flora v. *United States*, 362 U.S. 145 15
Frontiero v. *Richardson*, 411 U.S. 677 9
General Electric Co. v. *Gilbert*, 429 U.S. 125.....*passim*
Los Angeles Dep't of Water and Power v. *Manhart*, 435 U.S. 702 ..... 9, 40
McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 .....8, 14-15, 17
Miller v. *Youakim*, 440 U.S. 125 37
Montello Salt Co. v. *Utah*, 221 U.S. 452 15
Nashville Gas Co. v. *Satty*, 434 U.S. 136 21
North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 26
Power Reactor Development Co. v. *Int'l Union of Electrical Workers*, 367 U.S. 396 37
Ray-O-Vac v. *Dep't of Industry, Labor & Human Relations*, 70 Wis. 2d 919, 236 N.W. 2d 209..... 34
Reiter v. *Sonotone Corp.*, 442 U.S. 330 15
Rosen v. *Public Service Electric & Gas Co.*, 477 F.2d 90 8
Udall v. *Tallman*, 380 U.S. 1 37
Unemployment Comm'n v. *Aragon*, 329 U.S. 143..... 37
Union Free School District No. 6 v. *New York State Human Rights Appeal Board*, 35 N.Y. 2d 371 34
Wambheim v. *J.C. Penney Co.*, 642 F.2d 362..... 9
Weinberger v. *Weisenfeld*, 420 U.S. 636 9

Cases—Continued: Page

Wengler v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 9
Zuber v. *Allen*, 396 U.S. 168 37

Constitution, statutes and regulations:

U.S. Const.:
Amend. V (Due Process Cl.) 9
Amend. XIV 9
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. IV) 2000e *et seq.* 2
Section 701, 42 U.S.C. (& Supp. IV) 2000e .. 12
Section 701(k), 42 U.S.C. (Supp. IV) 2000e (k) 2, 12
Section 703, 42 U.S.C. 2000e-2 13
Section 703(a), 42 U.S.C. 2000e-2(a) 13
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) .. 10
Section 706, 42 U.S.C. 2000e-5 4
Section 717, 42 U.S.C. (& Supp. IV) 2000e-16 13
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 2
Section 1, 92 Stat. 2076 11
Section 2(b), 92 Stat. 2076 3
Section 3, 92 Stat. 2076 35
N.Y. Ins. Law §§ 162-a, 164-a (McKinney Supp. 1982) 31
1976 N.Y. Laws ch. 843, §§ 1, 2 31
29 C.F.R. 800.116(d) 40
29 C.F.R. Part 1604 ..... 2, 37, 40
Section 1604.9(d) 10, 38
Section 1604 app. 11
p. 140 ..... 3, 11, 25, 37, 39
Section 1620.5 (1981) 41
41 C.F.R. Part 60:
Section 60-1.21 41
Section 60-20.3(c) 41

Miscellaneous:

Commission Decision No. 70-510, 1973 E.E.O.C. Dec. (CCH) ¶ 6132 (Feb. 4, 1970) 10

Miscellaneous—Continued: Page

Commission Decision No. 70-513, 1973 E.E.O.C. Dec. (CCH) ¶ 6114 (Feb. 4, 1970) 10
Commission Decision No. 70-660, 1973 E.E.O.C. Dec. (CCH) ¶ 6133 (Mar. 24, 1970) 10
Commission Decision No. 71-1100, 1973 E.E.O.C. Dec. (CCH) ¶ 6197 (Dec. 31, 1970) 10
123 Cong. Rec. (1977):
p. 7539 19
p. 7540 12
p. 7541 20
p. 10582 ..... 20, 22
p. 10583 35
p. 29387 20
p. 29641 20
p. 29642 27
p. 29643 28
p. 29644 28
p. 29654 19
p. 29663 27
124 Cong. Rec. (1978):
p. 21436 20
pp. 29650-29652 31
1 *Digest of Health and Insurance Plans* (1974) 33
Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 29, 30, 31
44 Fed. Reg. (1979):
p. 23804 3
pp. 23804-23805 ..... 11, 25
46 Fed. Reg. (1981):
p. 38029 40
pp. 42968, 42971 41
p. 43848 41
p. 43851 41
Gillooly, *The Irrational Trend Towards Mandatory Maternity Coverage*, 26 Drake L. Rev. 758 (1976) 33

Miscellaneous—Continued: Page

H.R. Rep. No. 95-948, 95th Cong., 2d Sess., (1978) 18, 22, 34
Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 25, 30, 31
S. 995, 95th Cong., 2d Sess. (1978) 12, 20, 22, 26, 29
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) ..... *passim*
S. Roberts, *Dictionary of Industrial Relations* (1966) 28
Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1980) ..... *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a) is reported at 682 F.2d 113. The decision of the panel of the court of appeals (Pet. App. 2a-8a) is reported at 667 F.2d 448. The final opinion and order of the district court in Civil Action No. 80-20-NN (Pet. App. 9a-20a) is reported at 510 F. Supp. 66. The district court's final order in Civil Action No. 80-237-NN (Pet. App. 21a) is unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 22a-23a) were entered on June 22, 1982. The petition for a writ of certiorari was filed on September 10,

1982, and was granted on December 6, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, and the EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604, are set forth at Pet. 2-6.

STATEMENT

1. Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 (Pet. App. 50a), in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), which held that pregnancy-related classifications did not on their face constitute sex-based classifications under Title VII. The PDA amended the "Definitions" section of Title VII to add subsection (k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions * * *." 42 U.S.C. (Supp. IV) 2000e(k).[1]

---

[1] The full text of the new subsection states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother

Within seven months after the PDA's passage, the Equal Employment Opportunity Commission revised its Guidelines on Discrimination Because of Sex to reflect changes required by the Act. The final guidelines, and an Appendix of 37 Questions and Answers, were published on April 20, 1979.[2] 44 Fed. Reg. 23804 (1979), codified at 29 C.F.R. 1604 and Appendix. The Answers to Questions 21 and 22 (at 140) set forth the Commission's position that Title VII, as amended by the PDA, requires that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions" (see Pet. 5-6).[3]

2. In September 1979, John McNulty, an employee of petitioner, filed a charge of discrimination with the EEOC against petitioner, alleging that it had unlawfully refused to provide full insurance coverage for his wife's hospitalization due to pregnancy (J.A. 15). One month later, a similar charge was filed on behalf

---

would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

[2] Under Section 2(b) of the PDA (92 Stat. 2076), its provisions did not apply to fringe benefit plans until 180 days after enactment (*i.e.*, until April 29, 1979). Pet. App. 50a-51a.

[3] The guidelines also make clear that an employer is not obliged to provide the same level of health insurance coverage for pregnancy-related expenses of the spouses of male employees as it provides for its female employees. *Ibid.*

of petitioner's male production and maintenance employees by the United Steelworkers of America, their collective bargaining representative (J.A. 16-18).

The petitioner's hospitalization and medical-surgical health insurance plan extends coverage to employees, their spouses, and unmarried children (Pet. App. 29a-30a). The "Basic Plan" generally pays in full for a semi-private hospital room for up to 120 days and hospital services and "other necessary services while hospitalized up to 100% of the first $750, then 80% of the excess up to 120 days" (Pet. App. 31a-32a). A dependent's illness or injury is covered to the same extent as an employee's illness or injury, except that a dependent's pregnancy-related expenses are reimbursed only for "up to $500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges [sic]" (Pet. App. 37a).

Before the EEOC began to process the McNulty and Steelworkers charges, petitioner filed suit on January 31, 1980, against the Commission and the charging parties, seeking a declaratory judgment that the Commission's regulations interpreting the PDA were void, and requesting that the Court permanently enjoin EEOC from enforcing those interpretations (J.A. 5-14). After the Commission completed the processing of McNulty's charge, it filed suit on December 15, 1980, against petitioner under Section 706 of Title VII, 42 U.S.C. 2000e-5 (J.A. 28-30).

3. Before discovery commenced in the Commission's Title VII enforcement suit, the district court, on cross motions for summary judgment, ruled in favor of petitioner in its declaratory judgment action (Pet. App. 9a-20a). Based on that ruling, the court dismissed the EEOC's complaint in the Title VII action for failure to state a claim upon which relief

could be granted (Pet. App. 21a). Relying on *General Electric Co.* v. *Gilbert*, *supra*, the court held that petitioner's restriction on coverage for a spouse's pregnancy-related expenses "does not constitute gender-based discrimination" on its face and was not shown to have "caused any gender-based effect" in violation of Title VII (Pet. App. 16a-17a). The court recognized that the PDA was enacted in response to *Gilbert*'s holding that pregnancy classifications are not sex-based classifications, but concluded that the Act merely "carve[d] out a narrow exception" to *Gilbert*, which applied only to claims of pregnancy discrimination submitted by women employees or applicants for employment (Pet. App. 14a-16a).

A divided panel of the court of appeals, having consolidated the cases, reversed. The panel rejected the district court's view that the PDA's clarification of Title VII's definition of sex discrimination applied only to claims of female employees. Analyzing the PDA's language, the panel explained (Pet. App. 5a-6a; emphasis in original):

> The first clause of the subsection provides that the terms "because of sex" and "on the basis of sex" include because of, or on the basis of, pregnancy, childbirth and related medical conditions. By statutory definition those disabilities are within the meaning of the word "sex." There is nothing to suggest that the definition will vary depending upon the employment status of the pregnant woman. The second clause reads quite harmoniously with the first, since coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference

> to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected," it does not say "as other *employees* not so affected."

Turning to legislative history, the panel noted that two senators, Bayh and Cranston, specifically stated that Title VII, as amended by the PDA, would require complete coverage for employees' wives, including pregnancy-related coverage, where complete coverage is provided for husbands of women workers (Pet. App. 6a). Recognizing that the Senate Committee may have "thought the question an open one," the panel found that fact to provide "no platform for the company's contention that the question should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act" (Pet. App. 7a), *i.e.*, under the principles of *General Electric Co.* v. *Gilbert*, *supra*. Rather, the panel stated, "[u]pon enactment, the new subsection became an integral part of Title VII" and it established, for the purpose of subsequent litigation, that all "[d]istinctions based on pregnancy * * * are distinctions based on sex" (Pet. App. 7a). The panel concluded (*ibid.*):

> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

On rehearing en banc, a majority of the court upheld the panel's ruling for the reasons set forth in the panel's opinion (Pet. App. 1a).

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act of 1978 added one paragraph to Title VII's "Definitions" section in order to clarify that the statute's terms "because of sex" or "on the basis of sex" include because of or on the basis of pregnancy. In the courts below, the litigation turned on whether that definition applies only to claims of pregnancy-based discrimination against women workers, or whether it applies across-the-board to the analysis of all Title VII claims involving pregnancy. If applied across-the-board, the PDA, operating in conjunction with substantive Title VII principles that prohibit discrimination against men as well as women in the fringe benefits of employment, clearly renders petitioner's restrictions on spousal pregnancy coverage unlawful.

Across-the-board application of the PDA is supported by the plain language of the Act, which clarifies the definition of sex discrimination throughout Title VII, and specifically requires that all "women affected by pregnancy" shall be treated the same "for all employment-related purposes" as other similarly disabled persons. The legislative history confirms that Congress intended in the PDA to overrule entirely, for Title VII purposes, this Court's ruling in *General Electric Co.* v. *Gilbert*, *supra*, that distinctions based on pregnancy are not on their face based on sex, and to ban any pregnancy-based distinctions between employees. While the Senate report on the bill that became the PDA noted that its effect on benefit plans for dependents that exclude pregnancy benefits was an open question to be decided under basic Title VII principles, that reservation implies congressional recognition that such plans would be improper if they discriminated on the basis of the employee's sex—as they do when benefits for spousal pregnancies are de-

nied. Two sponsors of the bill expressly so stated in the debate immediately preceding passage of the PDA, and the cost estimates upon which Congress acted assumed that employer health benefit plans for dependents would be affected. Moreover, to read the PDA as providing protection only for female employees who are disabled by pregnancies would be to single them out for special benefits, inconsistently with Title VII's basic purpose of providing equal treatment for all employees, regardless of sex. Finally, the contemporaneous interpretation of the EEOC, communicated to Congress before the enactment of the PDA, is the one we urge here—that restrictions on spousal pregnancy coverage are unlawful under Title VII as amended by the PDA. That interpretation, to which the Commission has consistently adhered, is entitled to substantial deference.

ARGUMENT

I. TITLE VII PROHIBITS EMPLOYERS FROM DISCRIMINATING AGAINST MALES IN PROVIDING SPOUSAL MEDICAL BENEFITS

It is well-settled that Title VII forbids discrimination in fringe benefits against male as well as female employees.[4] It is equally clear that insurance cover-

---

[4] See, *e.g.*, *EEOC* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978) (life insurance benefits); *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975), rev'd for failure to award back pay, 427 U.S. 445 (1976) (retirement benefits); *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976) (same); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (same). Cf. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976) (white employee may allege race discrimination); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975) (white male may claim race discrimination when employment was denied because wife was black).

age for employees' spouses is a fringe benefit of employment that is protected by Title VII. *Wambheim* v. *J. C. Penney Co.*, 642 F.2d 362 (9th Cir. 1981) (health insurance plan); *Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 709 n.14 (1978) (retirement, disability, and death insurance benefit plan including spousal benefits).[5] Thus, a health insurance plan provided by an employer for his workers and their families that limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is thereby provided

---

[5] This Court has repeatedly held that federal statutes that provide less generous benefits to spouses of female wage earners than to spouses of male wage earners discriminate against the female wage earner on the basis of sex in violation of equal protection rights secured by the Due Process Clause of the Fifth Amendment. *Califano* v. *Goldfarb*, 430 U.S. 199, 207-208 (1977) (invalidating requirement applied solely to female wage earners that wage earner's widower prove he was receiving at least one-half support from his wife when she died to be eligible for survivor's benefits); *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 646-647 (1974) (survivor's benefits formerly available solely to male wage earner's survivors required for widower with minor children); *Frontiero* v. *Richardson*, 411 U.S. 677, 688-691 (1973) (female member of uniformed services need not prove spouse is dependent to obtain increased quarters allowance and medical and dental benefits since male member not subjected to this requirement). Cf. *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 147 (1980) (state statute requiring widower, but not widow, to prove dependence for entitlement to death benefits violates Fourteenth Amendment). In these spousal benefits cases, as in Title VII, the relevant comparison is between the female and male wage earner, since it is to the wage earner that the benefits flow.

less compensation than his female coworker. This practice on its face violates Section 703(a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's * * * sex."[6]

A plan that extends full coverage for employees' husbands but that limits coverage for employees' wives has the same effect. A distinction based explicitly on the sex of a spouse necessarily discriminates among employees on the basis of sex, since the spouse's sex defines the employee's sex.

Petitioner's plan does not deny full coverage to employees' wives expressly because they are women. However, because it restricts coverage on the basis of a spouse's pregnancy, it is no more lawful than a plan that restricts coverage on the basis of a spouse's sex if, as we submit and the court of appeals held, the PDA establishes the general principle that pregnancy-based distinctions are sex-based distinctions.[7]

---

[6] The Commission has always taken the position that it is an unlawful employment practice for a company to provide a health insurance plan that differs in coverage of dependents based on the sex of an employee. See Guidelines On Discrimination Because of Sex, 29 C.F.R. 1604.9(d); Commission Decision No. 70-510, 1973 E.E.O.C. Dec. (CCH) ¶ 6132 (Feb. 4, 1970) (health insurance); Commission Decision No. 70-513, 1973 E.E.O.C. Dec. (CCH) ¶ 6114 (Feb. 4, 1970) (death benefits); Commission Decision No. 70-660, 1973 E.E.O.C. Dec. (CCH) ¶ 6133 (Mar. 24, 1970) (health insurance); Commission Decision No. 71-1100, 1973 E.E.O.C. Dec. (CCH) ¶ 6197 (Dec. 31, 1970) (group insurance).

[7] Petitioner incorrectly claims that the court held its plan unlawful based on the PDA alone (Pet. Br. 11 n.14), and rendered it "unlawful for an employer's medical insurance

II. THE PDA APPLIES TO ALL TITLE VII CLAIMS INVOLVING PREGNANCY

The language and structure of the PDA, as well as its legislative history and the purposes and policies of Title VII, fully support the construction of the Act adopted by the court of appeals. That construction is, moreover, in accord with the contemporaneous interpretation of the Act by the agency responsible for its enforcement.

A. The Plain Language Of The Statute Applies To All Title VII Claims Involving Pregnancy

Section 1 of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, clarified the definition of sex discrimination by adding the follow-

---

plan to make *any* distinctions, based on pregnancy, childbirth, or related medical conditions, even distinctions which impact only on non-employees" (Pet. Br. 9; emphasis in original). After holding that the PDA establishes that pregnancy distinctions are sex-based for all Title VII purposes, the court struck down petitioner's plan because its pregnancy distinction discriminated between male and female employees in the receipt of spousal insurance coverage, a fringe benefit (Pet. App. 6a-7a). While the scope of the PDA's definition was the critical issue, the basis of liability was the discrimination that the pregnancy rule effectuated in violation of Title VII. A distinction based on a non-employee's pregnancy that does not result in discrimination between male and female employees—*e.g.*, a limitation or exclusion of medical coverage for the pregnancies of all employees' children—obviously does not violate Title VII. See 29 C.F.R. 1604 app., at 140 (Question and Answer 21); 44 Fed. Reg. 23804-23805 (1979) (Supplementary Information). Although the court of appeals did not address that issue, nothing in its opinion suggests that it would disagree.

ing Subsection to Section 701, the general "Definitions" section of Title VII: [8]

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. * * *

The first clause of Section 701(k), by its terms, provides the standard to be applied whenever any issue arises under Title VII involving pregnancy: discrimination "because of pregnancy, childbirth, or related medical conditions" is discrimination " 'because of sex.' " As Senator Harrison Williams explained when introducing the Senate bill (S. 995, 95th Cong., 2d Sess. (1978)), which ultimately became the PDA, the legislation "explicitly provide[s] that the term 'sex discrimination' within the meaning of the act includes discrimination based on 'pregnancy, childbirth or related medical conditions.' " 123 Cong. Rec. 7540 (1977), *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, at 3 (Comm. Print 1980) (hereinafter, "Leg. Hist."). This broad statement of principle plainly indicates that all discrimination among employees resulting from the different treatment of

---

[8] It is significant that Section 701 provides definitions "for purposes of this Title," not simply for some sections of the Act.

pregnancy-related conditions is sex discrimination prohibited by Title VII.[9]

The second clause of the PDA explains the effect of the first clause: it states that "women affected by pregnancy * * * shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *." This clause makes clear that under Title VII "women affected by pregnancy" shall not be treated differently from other persons

---

[9] Petitioner attempts to avoid the clear import of the first clause of the new definition by suggesting (Pet. Br. 10-11) that it means only that the substantive portions of Title VII should be read to include the new terms, and thus that Section 703(a) prohibits only discrimination against any individual "because of such individual's" pregnancy, childbirth or related conditions. But, of course, that is not the statute Congress enacted. Instead of simply amending Section 703(a) as petitioner suggests, it amended the general definition section, so that the term "sex discrimination" includes discrimination based on pregnancy, regardless of the particular phraseology in which the ban on sex discrimination is phrased in the substantive sections.

Petitioner's reading of the PDA would lead to anomalous and absurd results. Section 717 of Title VII, 42 U.S.C. (& Supp. IV) 2000e-16, provides that "[a]ll personnel actions affecting employees or applicants for employment [in the federal government service] * * * shall be made free of any discrimination based on race, color, religion, sex, or national origin", while Section 703, 42 U.S.C. 2000e-2, provides that private employers may not discriminate against any individual because of such individual's "race, color, religion, sex or national origin". Thus, under petitioner's mechanistic approach to the statute, private employers may treat pregnancy in a way which disadvantages male employees, while the federal government may not. There is absolutely no indication that Congress intended any such distinction. Cf. *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

covered in benefit plans including, of course, health insurance benefit plans of the sort involved here.[10] It does not refer to pregnancies of *employees*, or otherwise suggest that pregnant spouses are not "women affected by pregnancy." As the court of appeals observed (Pet. App. 5a-6a), the requirement in the second clause that such women be treated like other persons not so affected but "similar in their ability or inability to work" means that pregnancy, to the extent it creates a disability, is to be treated as are all other disabilities that "persons" may suffer.[11] It thus effectuates Congress's intent to overrule the underlying rationale of *Gilbert* "that employers may treat pregnancy and its incidents as *sui generis* without regard to its functional comparability to other conditions." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). Neither literally nor conceptually does this phrase require that the woman whose pregnancy occasions the claim for medical expenses under a health insurance plan herself work for the employer under whose plan the claim is made, or for any employer.[12]

---

[10] Significantly, the next sentence of the paragraph refers expressly to health insurance benefits, so congressional attention was evidently focused on the impact of the amendment on such plans.

[11] It also means that to the extent pregnancy does not disable, pregnant women are to be treated like other able persons.

[12] The argument that comparison to "ability or inability to work" in the second clause limits the PDA's scope to claims of female workers resembles the argument rejected by this Court in *McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*. The Court there held that 42 U.S.C. 1981 protects whites against racial discrimination because the statute's comparison to rights "enjoyed by white citizens" simply "emphasiz[ed] the 'racial character of the rights being protected' "

Even if, as petitioner argues (Pet. Br. 19-20), the second clause were read as applying only to women employees, it would hardly follow that the clause restricts the Act's definition to claims of women workers. The Committee Reports and sponsor's statements upon which petitioner relies (Pet. Br. 16, 19-20) unequivocally state that the Act first broadens Title VII's definition of sex discrimination to subsume pregnancy discrimination, and then "also makes clear" or "specifically * * * define[s]" what treatment of pregnant women workers is mandated by that definitional amendment. Thus, the second clause at best applies the PDA's definition in a particular set of circumstances; it cannot be read to limit its application to those circumstances.[13]

To read the second clause as limiting the Act's scope, moreover, contravenes the well-established rule that statutes must be interpreted to give effect, where possible, to every word Congress used. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). If, as petitioner contends, the PDA was enacted only

---

and did not restrict the statute's protection to non-whites. 427 U.S. at 827. Here, the comparison emphasizes the functional basis of the conditions to be covered. See S. Rep. No. 95-331, *supra*, at 4.

[13] We note that the second clause of the PDA is joined to the first by the conjunction "and," a word which "is always employed to express the relation of addition." *Montello Salt Co.* v. *Utah*, 221 U.S. 452, 466 (1911). Thus, the second clause, grammatically, forms a conjunctive proposition and not a conditional proposition that limits or subtracts from the first. Although no court should "review congressional enactments as a panel of grammarians * * * neither [should it] regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora* v. *United States*, 362 U.S. 145, 150 (1960).

to protect women employees from pregnancy-based discrimination, the first clause is inoperative because the second alone completely effectuates that intent. Under petitioner's interpretation the second clause comprehensively prohibits discrimination against pregnant women workers, by requiring that they be treated in all phases of employment the same as other persons similarly-situated with respect to their ability or inability to work. Thus, the first clause is mere surplusage. In order to give effect to the PDA's language in its entirety, petitioner's construction of the statute must be rejected.[14]

B. The Legislative History Confirms The Plain Meaning of the PDA

1. A primary impetus behind the enactment of the PDA was to protect women employees from the consequences of the decision in *General Electric Co.* v. *Gilbert*, *supra*, as the congressional statements cited by petitioner attest (Pet. Br. 14-19). However, the fact that Congress expressed a special concern for "working women" cannot, standing alone, support an interpretation of the new definition added by the PDA that conflicts with the established principle that both women and men are protected by Title VII. Such expressions are similar to the numerous state-

---

[14] Petitioner asserts that each clause of the Act was designed to overrule, for the benefit of women workers, each of two purported "holdings" of *Gilbert*, *i.e.*, that pregnancy discrimination against female employees is not gender-based, and that Title VII does not require employers to pay the extra cost of covering pregnancy under fringe benefit programs (Pet. Br. 29-30). Even if petitioner has accurately summarized *Gilbert* (and we think it has not), those two holdings are effectively overruled by the second clause alone.

ments in previous Title VII legislative history that voice concern over the protection of "blacks," "minorities," and "women"; those statements are not to be read as establishing that whites and men are not protected by Title VII. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).[15]

Moreover, to interpret the PDA as amending Title VII's definition of sex discrimination only for the benefit of women workers would overlook the fact that Congress rejected not only the narrow holding, but also the rationale, of *Gilbert*, and intended in the new Act simply to assure that Title VII would bar discrimination on the basis of pregnancy, just like any other sex-based discrimination. Although Congress clearly intended to require non-discriminatory treatment of women employees, it certainly did not intend to require discrimination in their favor, as petitioner's reading of the PDA suggests.

The legislative history of the PDA makes clear that Congress's purpose in enacting the statute was to overrule entirely, for purposes of Title VII, the rationale of this Court in *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 136, that "pregnancy * * * is not gender-based * * * at all", and to adopt instead the analysis of the dissenters in that case. As the

---

[15] Nor does the absence of extensive congressional debate on the subject of dependent coverage support an interpretation that restricts the language of the PDA which, by its terms, reaches discrimination on the basis of dependent spouses' pregnancies. Congress often fails to debate all aspects of legislation fully, as this Court has noted with respect to Title VII. See *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 136 (Title VII's legislative history on sex discrimination is "notable primarily for its brevity."); *County of Washington* v. *Gunther*, 452 U.S. 161 (1981).

Senate Report states (S. Rep. No. 95-331, *supra*, at 2-3; Leg. Hist. 39-40): [16]

> In the committee's view, the following passage from the two dissenting opinions in [*General Electric Co.* v. *Gilbert*] correctly express both the principle and the meaning of Title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'." Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."
>
> Thus, S. 995 was introduced to change the definition of sex discrimination in Title VII to reflect the "commonsense" view and to insure that working women are protected against all

---

[16] Similarly, the House Report (H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 23 (1978); Leg. Hist. 148-149) states:

> Justice Brennan, in a dissenting opinion * * * pointed out that since the [*General Electric*] plan included comprehensive coverage for males, and failed to provide comprehensive coverage for females, the majority erred in finding that the exclusion of pregnancy disability coverage was a non-discriminatory policy. Furthermore, Justice Stevens, in his dissenting opinion, argued that "it is the capacity to become pregnant which primarily differentiates the female from the male."
>
> It is the committee's view that the dissenting Justices correctly interpreted the Act.
>
> * * * * *
>
> H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on [illegible]

> forms of employment discrimination based on sex.
>
> * * * * *
>
> This bill is intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth and related medical conditions is discrimination based on sex.

It is manifest throughout the history of the amendment that Congress disagreed with, and intended to overturn, the entire rationale of *Gilbert*.[17] For example, in introducing the Senate bill, Senator Williams emphatically took issue with the *Gilbert* decision, explaining that "when an employer's plan provides protection in the event of virtually every conceivable disability but one, and that one can affect only women, it is an inescapable conclusion that such a plan by definition discriminates on the basis of sex". 123 Cong. Rec. 7539 (1977); Leg. Hist. 1-2. Congressman Hawkins, introducing H.R. 5055, agreed:

> This view [in *Gilbert*]—that a classification which harms only women and does so on the basis of a factor inextricably linked to gender is

---

[17] Thus, the Senate Report states:

> [T]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions.

S. Rep. No. 95-331, *supra*, at 4; Leg. Hist. 41. Similarly, Senator Javits—the ranking Republican member of the committee which considered S. 995, the bill which became the PDA—explained that pregnancy should not be treated as unique, stating:

> We do not want pregnancy discriminated against, as contrasted with a broken leg or a strep throat or appendicitis or some other basis for disability.

123 Cong. Rec. 29654 (1977); Leg. Hist. 106.

> not discrimination against women just because not all women are affected—is contrary to any sensible approach to what constitutes discrimination. For, as Justice Stephens [sic] noted in his dissent in *Gilbert*.
>
> It is the capacity to become pregnant which primarily distinguishes the female from the male, so that a rule which treats pregnancy as unique by definition * * * discriminates on account of sex.
>
> * * * * * *
>
> Therefore, H.R. 5055 is designed to make clear that * * * this Congress does regard discrimination based on pregnancy as discrimination based on sex and, in particular, that employers * * * must treat pregnant women as they treat other employees similar in their ability or inability to work.

123 Cong. Rec. 10582 (1977); Leg. Hist. 24.[18]

Despite this clear evidence that the PDA reflects congressional rejection of the rationale of *Gilbert*,

---

[18] See also, *e.g.*, the remarks of Senator Mathias, 123 Cong. Rec. 7541 (1977); Leg. Hist. 8 ("the Supreme Court has seen things differently. * * * Now the ball is back in the Congress' court. And, we have an opportunity * * * to amend Title VII to make clear that sex discrimination includes classifications based on pregnancy. The legislation which we now introduce, will achieve that goal."); remarks of Senator Javits, 123 Cong. Rec. 29387 (1977); Leg. Hist. 67 ("This principle, that discrimination against pregnant women is sex discrimination, is the substance of S. 995. As Mr. Justice Stevens stated: '(b)y definition, such a rule discriminates on account of sex'"); remarks of Senator Bayh, 123 Cong. Rec. 29641 (1977); Leg. Hist. 73 (bill made necessary by *Gilbert*, in which "broad exclusion of pregnancy discrimination under Title VII holds many unfortunate implications for other related issues"); remarks of Mr. Sarasin, 124 Cong. Rec. 21436 (1978); Leg. Hist. 168 (endorses Justice Stevens's dissent).

petitioner asks this Court to apply the *Gilbert* analysis here and even argues that *Gilbert* "establishes the only pertinent 'Title VII principles' " for application to this case (Pet. Br. 37).[19] More accurately, the *Gilbert* dissents, which were adopted in the PDA, establish those principles. Petitioner's construction of the PDA as applying only to women employees is wholly at odds with the Act's broad rejection of *Gilbert*. Petitioner asks this Court to hold that Congress in the PDA provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral—a result hardly consistent with the "commonsense view" expressly endorsed by Congress.[20]

Moreover, it is entirely clear that Congress did not intend, in enacting the PDA, to require any special preferential treatment for female employees. Instead, the PDA was designed to adopt the *Gilbert* dissenters' view of the scope of Title VII, and simply to require implementation of that Title's anti-

---

[19] Indeed, petitioner's arguments that rely on *Gilbert* (and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), which follows *Gilbert*) to show that its plan has no prohibited discriminatory effect (Pet. Br. 41-49) are beside the point because the PDA establishes that the denial of spousal benefits here violates Title VII on its face. The Court in *Gilbert* considered the effects of the pregnancy exclusion there only after it had concluded that a distinction based on pregnancy did not on its face violate Title VII. When Congress rejected that conclusion, it rendered unnecessary the consideration of the effects of pregnancy distinctions.

[20] Petitioner's argument also adopts precisely the "*sui generis*" treatment of pregnancy that Congress rejected (see p. 19 n.17, *supra*); it would allow employers to single out pregnancy as the one spousal condition for which health benefits are limited.

discrimination principles within that newly clarified scope. See, *e.g.*, S. Rep. No. 95-331, *supra*, at 4, Leg. Hist. 41 ("Basic to all * * * applications is that the bill, because it would operate as part of Title VII, prohibits only discriminatory treatment"); H.R. Rep. No. 95-948, *supra*, at 4; Leg. Hist. 150 ("It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment"); 123 Cong. Rec. 10582 (1977); Leg. Hist. 25 (remarks of Rep. Hawkins) ("It is also important to understand what this bill would not do. Like Title VII generally, it merely requires that employers not discriminate"). Petitioner's claim that the PDA is a special protective statute for women employees (Pet. Br. 30-31) ignores this clear evidence of Congress's contrary intent.

2. Nor does our contention rest solely on general expressions of the congressional intent to reject *Gilbert* and require that pregnancy-related disabilities be treated like any other non-work related disability. The Senate Report on S. 995, the bill that became the PDA, strongly implied that spousal pregnancy costs were to be treated like other disabilities, and both sponsors and opponents of that bill—and the EEOC itself—specifically informed Congress that Title VII as amended by the PDA would require that result. Moreover, the estimates considered by Congress of the PDA's financial impact on medical insurance plans included costs for spousal pregnancy coverage.

The Senate Report notes that although the "basic" (not the only) purpose of the PDA is "to protect women employees", it was not designed to "alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore, the question in regard to depend-

ents' benefits would be determined on the basis of existing title VII principles" S. Rep. No. 95-331, *supra*, at 5-6; Leg. Hist. 42-43. The Report explained those "existing principles" to some extent: it noted that they would not require that pregnancies of dependents be treated like employee pregnancies. But it recognized that "the question of whether an employer who does cover dependents * * * may exclude conditions related to pregnancy from that coverage is a different matter." Because the committee was not aware of any litigated cases involving such plans, it noted only that although "[i]t is certainly not this committee's desire to encourage the institution of such plans", there was an open question "[if] such plans should be instituted in the future" as to "whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of the coverage for their dependents" (*ibid.*).

The clear congressional rejection of this Court's decision in *Gilbert* as an accurate assessment of Title VII principles (see pages 17-20, *supra*) refutes petitioner's suggestion (Pet. Br. 37) that the reference in the Senate Report to "existing Title VII principles" was an invitation to the courts to reaffirm the *Gilbert* analysis of pregnancy as unrelated to sex discrimination, if only in the context of spousal pregnancy.[21]

---

[21] If petitioner were correct, the validity of plans of the sort the Report states the committee "certainly [did] not * * * desire to encourage" (S. Rep. No. 95-331, *supra*, at 6; Leg. Hist. 43) would be virtually beyond dispute. *Gilbert* held that the exclusion of pregnancy from a benefits program is not sexually discriminatory absent a showing of disparate impact in the actuarial value of the benefit packages available to men and women. Since such a showing could not be made (see Pet. Br. 44-48) any challenge to the exclusion of spousal pregnancy

Instead, the courts were to accept the newly clarified "definition of sex discrimination for Title VII purposes" and apply it, consistently with accepted Title VII principles, to any case that arose "in the future"—*i.e.*, after Title VII had been amended by the PDA.

Clearly, the "existing Title VII principles" to which the Report refers are the substantive precepts relevant to this issue, viz., that men as well as women are protected under the statute from treatment in the work place which is less favorable than that accorded the opposite sex; that dependent health coverage is a benefit which flows to the wage earner; and that a health insurance plan which limits the extent of dependent coverage because of the sex of the employee is unlawful.

The Report recognized that those principles do not require that dependents be treated like employees.[22] As to the "different matter" of whether an employer plan that covers dependents may exclude the pregnancies of dependents, the answer to the open ques-

---

coverage from an employer's insurance plan, as a practical matter, would be doomed to failure under *Gilbert*.

[22] Under Title VII "the basic standard is comparability among employees" (S. Rep. No. 95-331, *supra*, at 5; Leg. Hist. 42). Petitioner incorrectly claims that because the Report states that the PDA would not require employers to provide maternity benefits for the spouses of their male employees to the same extent that they provide for their female employees, *Gilbert* controls the spousal benefits issue (Pet. Br. 8, 30-31 & n.37). The Report simply rejected the suggestion that spousal pregnancy coverage would be required "whether or not the employer provided any other coverage for dependents". If Congress had intended the PDA to have no application to the issue of spousal pregnancy benefits, the fact that the employer may otherwise provide dependent coverage would have been irrelevant.

tion reserved by the Report depends on whether the restriction discriminates between male and female employees. Although limitations on spousal pregnancies do so discriminate (see pages 9-10, *supra*), a limitation—applicable to male and female employees alike—on recovery for pregnancies of dependent children would not, and thus would not violate Title VII. See 29 C.F.R. 1604 app., at 140 (Question and Answer 21); 44 Fed. Reg. 23804-23805 (1979) (Supplementary Information).

b. The legislative history explains why the Senate Report expresses doubt about the validity of limitations on pregnancy benefits for dependents. On June 6, 1977, Senator Jacob Javits—the ranking Republican member of the Senate Committee on Human Resources, to which the pregnancy discrimination bill, S. 995, was referred—wrote to the head of EEOC on behalf of the Committee. Senator Javits requested the views of the Administration on the issue of "possible health insurance implications of the bill for maternity and other sex-linked coverages" (J.A. 42-44).

In a letter dated June 28, 1977,[23] and signed by Chairman Eleanor Holmes Norton of the EEOC,

---

[23] The original reply to Senator Javits' inquiry (J.A. 45-47) could be read as indicating that the proposed bill would require employers to cover the costs of spousal pregnancies whether or not they offered other dependent medical coverage. In contrast, Assistant Attorney General Drew Days had stated in House Hearings on the bill that it would not "reach dependents" (*Legislation to Prohibit Sex Discrimination On the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before The Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 187 (1977) (hereinafter "*House Hearings*")). The June 28, 1977 letter to Senator Javits obviously represented the final government position on the effect of the bill.

Solicitor Carin Clauss of the Department of Labor, and James P. Turner, Acting Assistant Attorney General for Civil Rights of the Department of Justice (J.A. 48-49), the government explained that:

> the additional medical insurance required by the bill for female employees would be required for the wives of male employees * * * only * * * where the employer maintains an otherwise comprehensive health insurance plan covering both employees and their dependents. It would not apply where the employer offers health insurance to employees only. In those circumstances, it would not be necessary to cover the medical costs of a dependent wife's pregnancy.

The Senate Committee issued its Report on S. 995 more than a week after the date of this letter. Surely, if Congress had disagreed with the views expressed therein, it would have stated that the administrative interpretation exceeded the Act's reach. It did not do so.[24]

c. Moreover, in debate on the Senate floor, two sponsors of the bill clarified the reference in the Senate Report to "Title VII principles" and their application to the denial of spousal pregnancy benefits.[25] Both Senator Bayh and Senator Cranston expressed the view that under the bill spousal pregnancies could

---

[24] Indeed, the Senate Report citation of "existing Title VII principles" (S. Rep. No. 95-331, *supra*, at 5), may well refer to the analysis contained in the government responses to Senator Javits's inquiry, since those responses referred to "general Title VII principles" to explain the result they reached.

[25] Statements of the sponsors of legislation are entitled to significant weight. *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14.

not be excluded from general medical services available to dependents.[26]

These were the only legislators to address the PDA's application to insurance coverage for pregnant spouses; no one expressed any disagreement with their elaboration on the statement in the Senate Report, or

---

[26] Senator Bayh stated (123 Cong. Rec. 29642 (1977); Leg. Hist. 75):

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment [see p. 9 n.5, *supra*] in addition to previous interpretations of Title VII regulations relating to the treatment of dependents [see p. 10 n.6, *supra*] will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

Senator Cranston, stated in the same debate (123 Cong. Rec. 29663 (1977); Leg. Hist. 131):

> When the Human Resources Committee considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents, and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.
>
> Mr. President, I would like to express for the record my own view that such a plan would indeed be discriminatory, and would be prohibited by the title VII sex discrimination ban.

suggested that their remarks were in any way inconsistent with the analysis contained therein.[27] Instead,

---

[27] Indeed, Senator Williams—who, petitioner claims, [redacted] made clear that only pregnant workers would be protected by the bill (Pet. Br. 28)—rose immediately after Senator Bayh's remarks without taking issue with his views. 123 Cong. Rec. 29643 (1977); Leg. Hist. 77.

None of Senator Williams's statements quoted by petitioner limit the PDA to claims of women employees. While he stated that the Act would protect, and was necessary to protect, women workers, he nowhere stated that this was its sole purpose (see Pet. Br. 14-15). Petitioner misreads his colloquy with Senator Hatch (Pet. Br. 24-26) and with Allen Lazarescu of the American Council of Life Insurance (ACLI) (Pet. Br. 26) to argue otherwise. Senator Hatch inquired whether the phrase "women affected by pregnancy" included women employees who were not themselves pregnant or dependents of employees. 123 Cong. Rec. 29644 (1977); Leg. Hist. 80. Senator Williams answered, *solely in the context of income maintenance plans*, that the Act applied only to women employees themselves pregnant (*ibid.*). Such plans protect an employee from loss of wages while he is absent from work due to a disability (S. Roberts, *Dictionary of Industrial Relations* 78 (1966)) and thus necessarily apply only to employees. On the other hand, medical benefit or health insurance plans do not replace lost wages but instead reimburse an employee for medical costs related to a disability. *Id.* at 136. Such plans may be provided for employees only, or, as here, for an employee, a spouse, and other dependents. The legislative history of the PDA shows that Congress was well aware of the distinction between disability and medical insurance. See, *e.g.*, the distinctions in both the Senate and House Reports between disability insurance and medical insurance (S. Rep. No. 95-331, *supra*, at 4-5; Leg. Hist. 41-42; H.R. Rep. No. 95-948, *supra*, at 5-6, Leg. Hist. 151-152). Petitioner argued below that to read Senator Williams's response as limited to income maintenance plans rendered it redundant or meaningless because to state that only women employees can receive income maintenance for work absence occasioned by their pregnancies is to state the obvious. This argument ignores the hypo-

having heard these statements, the Senate later on the same day voted overwhelmingly to pass S. 995.[28]

---

thetical posed by Senator Hatch which included whether women employees "affected by" the pregnancies of their daughters or co-workers with whom they car pool fall within the protection of the Act. Senator Williams's answer, that these women would not be entitled to income maintenance unless they themselves were pregnant, is responsive to Senator Hatch's inquiry.

Similarly, Senator Williams's statement that the Act "only deals with women employees," made during his exchange with ACLI representative Allen Lazarescu, occurred after an extended discussion between the two regarding the accuracy of the ACLI's estimate of the PDA's effect on disability benefits (*i.e.*, income maintenance) costs. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 397-402 (1977) (hereinafter *"Senate Hearings"*). As the discussion shows, Senator Williams was concerned about whether ACLI's use of women in the work force to estimate those costs was limited to workers in "the age groups where conservatively you might expect pregnancy" (*id.* at 402). Senator Williams's remarks were intended merely to determine whether estimates were based on the proper number of women in the work force so as to insure that estimates of disability coverage were not inflated, rather than to limit coverage of medical insurance benefits.

[28] Petitioner's suggestion (Pet. Br. 26) that these views were "idiosyncratic (and erroneous) view[s] of Title VII law prior to passage of the PDA" is accordingly unavailing. The Senators were, in effect, answering the questions raised in the Senate Report. Having heard their answers, the Senate passed the bill. It accordingly makes little difference whether the views when expressed were "idiosyncratic" or even correct—the crucial point is that the subsequent congressional action ratified them. See *Brown* v. *GSA*, 425 U.S. 820, 828 (1976). In any event, the explanations given of the effect of the PDA on established Title VII principles, and the conclusions as to the validity of exclusion of benefits for spousal pregnancy, were correct (see pp. 11-16, *supra*).

d. The opponents of the legislation agreed that employers who provided insurance coverage for spouses would be required to cover pregnancy as well. This view was expressed during the hearings by Richard Minck, Vice President and Actuary of the American Council of Life Insurance (ACLI), who stated (*House Hearings, supra*, at 120-121):

> The bill is drafted not in terms that you treat your male employees the same as your female employees, but in terms of saying that you make the same treatment for pregnancy that you do for any other disability.
>
> So that would mean whether the pregnancy involves the wife of a male employee, or a female employee, you would have to provide the same medical benefits on the same terms that you do for pneumonia.
>
> * * * * *
>
> You could not have a $500 flat benefit.

No Congressman at the hearing disagreed. This uncontradicted interpretation of the bill's scope is thus useful evidence of congressional intent. *Arizona* v. *California*, 373 U.S. 546, 582-583 and n.85 (1963).

e. The Congress considered several estimates of the effects to be anticipated from the PDA on the costs to employers of medical insurance plans. All of these estimates assumed that enactment of the PDA would affect the cost of pregnancy coverage for dependents of employees.

In response to requests from Congressman Hawkins and Senator Williams (see *House Hearings, supra*, at 180; *Senate Hearings, supra*, at 556), the Department of Labor prepared a report on the PDA's ramifications for employers' insurance costs. The Department's report stated (footnote omitted):

> The costs of private sector health insurance will also be affected by H.R. 6075. However, precise data on the cost impact of the bill with respect to health insurance plans could not be estimated reliably. Published data from the Social Security Administration with information on dependents' health care coverage are only available through 1970. Thus, this coverage would have to be extrapolated to 1976 with * * * significant further adjustments to assess costs for dependents * * *.

Senate Hearings, *supra*, at 563-564; *House Hearings*, *supra*, at 182.

The American Council of Life Insurance, in opposition to the bill, also submitted a report estimating that the PDA would increase health insurance costs by $1.1 billion. That figure was based on the number of women in the child-bearing population, not simply on the number of women employees of child-bearing age (the figure that report used to estimate increased *disability* insurance costs). The ACLI report extrapolated its national estimate from the cost experience in New York State, where the state insurance law was amended in 1976 to require that all group and individual health insurance policies provide coverage for maternity care of the insured and the insured's dependents to the same extent as coverage for other illnesses or diseases.[29] See *Senate Hearings*, *supra*, at 399, 402, 424, 425-426, 431; *House Hearings*, *supra*, at 94, 96, 98-99, 104.[30]

---

[29] See N.Y. Ins. Law §§ 162-a, 164a (McKinney Supp. 1982); 1976 N.Y. Laws, ch. 843 §§ 1, 2.

[30] The ACLI estimates were presented and discussed during debate on the bill by the entire Senate (124 Cong. Rec. 29650-29652 (1978); Leg. Hist. 98-102). Petitioner is therefore incorrect in asserting that "even opponents of the Act * * * did not include the enormous costs of dependents' coverage in their

Congress's discussion of these two reports is illuminating. Although the Senate Committee Report discredited the ACLI's $1.1 billion figure as "demonstrably too high" (S. Rep. No. 95-331, *supra*, at 9, Leg. Hist. 46), it did not suggest that estimates based on the New York law inappropriately included the costs of dependent maternity coverage. Instead, the Senate Report faulted the estimate only because it was "apparently based upon the assumption that this legislation would require medical and hospital insurance coverage for maternity under all plans administered by insurance companies" (*ibid.*). The Report countered that, in fact, "[t]his legislation does not require that hospital medical insurance benefits be provided for maternity, it merely requires that where hospital medical benefits are provided they must be provided on a nondiscriminatory basis" (*ibid.*).[31] The Report

---

estimates" (Pet. Br. 23 n.33). Moreover, of the three witness statements cited by petitioner in support of this proposition, two addressed only the increased costs for providing *disability benefits* for pregnancy which, of course, are simply not available to dependents (see p. 28 n.27, *supra*). Similarly, in asserting that "[t]he cost of covering pregnant employees, not the cost of covering pregnant wives of male employees, was the focus of all debate and discussion on the economic effects of the Act", petitioner cites ten statements of witnesses at the congressional hearings, all of whom addressed only the cost of providing *disability benefits* for pregnancy (Pet. Br. 23 n.32). This cost "debate and discussion" could not have delimited the scope of the PDA, or even women employees would not be entitled to medical coverage for their pregnancies under Title VII as amended.

[31] The Report observed that "[a]ccurate calculation of the cost of correcting discriminatory plans would require detailed information about the number of women covered by employment-related medical plans which are discriminatory" and the degree to which those plans discriminate. S. Rep. No. 95-331, *supra*, at 9-10; Leg. Hist. 46-47. In a footnote, the Report

then also noted that the cost of the PDA "would not include the provision of hospital medical benefits for maternity in States, like New York, where insurance for maternity is mandatory under State law," nor would it include "adjustments to provide nondiscriminatory coverage of medical conditions related to pregnancy [in 25 states] where nondiscrimination is already mandated by State law." *Id.* at 10; Leg. Hist. 47; see also H.R. Rep. No. 95-948, *supra*, at 10; Leg. Hist. 156.[32]

---

referred to the Department of Labor's 1 *Digest of Health and Insurance Plans* (1974) as indicating that of 148 representative health plans summarized, 59% appeared to provide nondiscriminatory maternity coverage while 41% appeared to be discriminatory. *Id.* at 10 n.1; Leg. Hist. 47 n.1. All of the health benefits described in those plans—including maternity benefits—were applicable to employees and their dependent spouses and children. *Digest of Health and Insurance Plans, supra*, at IX (and summaries of individual plans).

[32] Petitioner wrongly asserts that the "mandatory maternity coverage" in New York to which the Senate Report referred was a product of the state court decision in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y. 2d 84, 359 N.E. 2d 393, 390 N.Y.S. 2d 884 (1976) and the state's Workers' Compensation Law, neither of which "required employers providing spousal medical benefits to insure against spousal pregnancies" (Pet. Br. 22). As we have shown, the New York insurance law cited in the Report (S. Rep. No. 95-331, *supra*, at 9; Leg. Hist. 46) and by the ACLI (see S. Rep. No. 95-331, *supra*, at 27) does require coverage for spousal pregnancy on the same terms as coverage for any other illness or injury. Other states had similar laws. See Gillooly, *The Irrational Trend Towards Mandatory Maternity Coverage*, 26 Drake L. Rev. 758, 764-765 (1976) (collecting statutes).

Although the Senate Report cited *Brooklyn Gas* when it referred to New York as one of the 25 states in which the PDA would impose no substantial additional medical insurance costs, petitioner's argument (Pet. Br. 22) that this refer-

The Senate Report then specifically addressed the Department of Labor's report, and agreed with its conclusion that no accurate estimate of the bill's impact on medical insurance costs was possible. Significantly, neither the Senate nor the House took issue with Labor's position that any such estimate would have to include "adjustments to assess costs for dependents" (p. 31, *supra*). S. Rep. No. 95-331, *supra*, at 10; Leg. Hist. 47; H.R. Rep. No. 95-948, *supra*, at 10; Leg. Hist. 156.[33]

---

ence shows Congress did not intend the PDA to affect dependent pregnancy coverage, because *Brooklyn Gas* dealt only with women employees, is spurious. The issue in *Brooklyn Gas* was whether the denial of disability benefits and sick leave to pregnant women workers violated the state's prohibition against sex discrimination. In finding such a violation, the court merely reaffirmed its previous rulings that pregnancy discrimination is sex discrimination. See, *e.g.*, *Union Free School District No. 6* v. *New York State Human Rights Appeal Board*, 35 N.Y. 2d 371, 320 N.E. 2d 859 (1974). The rationale of *Brooklyn Gas* thus mandates non-discriminatory medical coverage of pregnancy, regardless of whether the pregnancy is that of a woman employee or a male employee's spouse. The same is true of the Wisconsin and Pennsylvania state court decisions cited by petitioner (Pet. Br. 22 n.31): *Anderson* v. *Upper Bucks County Area Vocational Technical School*, 30 Pa. Commw. 103, 373 A.2d 126 (1977) (denial of sick leave to pregnant employees is unlawful under state law banning sex discrimination because "pregnancy-based discrimination constitutes sex discrimination"); *Ray-O-Vac* v. *Dep't of Industry, Labor & Human Relations*, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975) ("Pregnancy is undeniably a sex-related characteristic", so limitation on disability benefits for pregnant employees is unlawful under state law banning sex discrimination).

[33] Petitioner's characterization of the additional medical insurance costs for covering spousal pregnancy as "staggering" (Pet. Br. 23), thus is not supported by any congressional find-

3. Even if the legislative history were less clear than it is, this Court should be reluctant to adopt petitioner's interpretation that the PDA was intended to provide a special benefit for working women. As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, men as well as women, the right to be free of discriminatory treatment in the work place. It prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of women as well as men on the basis of their sex. Petitioner's position, that the PDA amendment of Title VII's definition of sex discrimination applies only to claims of women workers, would distort the fundamental anti-discrimination principles upon which Title VII is founded.

---

ing. It is also wholly without record support in this case. We do not, of course, contend that the cost of non-discriminatory coverage for spousal pregnancy is de minimis. However, as Congressman Hawkins stated in the debate on the PDA, 123 Cong. Rec. 10583 (1977); Leg. Hist. 26:

> The main argument raised against prohibiting pregnancy-related discrimination is that it will be costly. But eradicating invidious discrimination by definition costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or title VII, and it should not prevent this Congress from making clear that title VII prohibits this form of sex discrimination as well.

And, of course, employers are now free to adjust the benefits or contributions associated with their medical insurance plans in a non-discriminatory fashion. See Section 3 of the Act, Pub. L. No. 95-555, 92 Stat. 2076 (Pet. App. 51a).

As this case demonstrates, men as well as women workers may be disadvantaged by employers' policies or programs that treat pregnancy less favorably than other medical conditions or disabilities. Under petitioner's view, the PDA extends protection from such pregnancy-based discrimination to women employees while withholding the same protection from their male colleagues. It is most unlikely that Congress, in a simple definitional amendment to Title VII, would have mandated this special, preferential treatment which is contrary to the basic principles of the underlying law. Indeed, given the inconsistency of such a requirement with the underlying purpose of Title VII, it would be appropriate for a court to require a clear statement in the statute itself of any such purpose, or, at the very least, unambiguous legislative history explaining the legislative intent to create an exception to the basic statutory purpose. *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). No such explanation exists here. Instead, as we have shown, the legislative history clearly indicates that the clarified definition is to be read harmoniously with the basic principles of Title VII, and indeed that Congress anticipated that an employer's plan providing medical benefits to dependents would not treat spousal pregnancies less generously than other disabilities.

III. THE CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION OF THE PDA IS ENTITLED TO SUBSTANTIAL JUDICIAL DEFERENCE

The EEOC is the agency charged by Congress with the interpretation and administration of the PDA. Its contemporaneous construction of the Act's impact on Title VII with respect to the provision of medical insurance coverage for spousal pregnancy is set forth in the Appendix to its interpretative regulations (29

C.F.R. 1604) as Questions and Answers 21 and 22, which was issued seven months after passage of the PDA and several days before its effective date with regard to such fringe benefits as health insurance plans (see p. 3 & n.2, *supra*). Great weight should be given to that construction. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Indeed, to sustain an agency's interpretation of the statute for which it is responsible, a court " 'need not find that [the agency's] construction is the only reasonable one, or even that it is [a] result [the court] would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). Rather, that interpretation must be sustained absent "compelling indications that it is wrong." *Miller* v. *Youakim*, 440 U.S. 125, 144-145 n.25 (1979); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973). Moreover, judicial deference is particularly appropriate here, because the head of EEOC informed the Congress of the agency's construction of the statute—stated in the Questions and Answers and urged here—while the PDA was still under consideration, and that construction was not challenged (see pp. 25-26, *supra*). *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); accord *Power Reactor Development Co.* v. *Int'l Union of Electrical Workers*, 367 U.S. 396, 409 (1961); *Baltimore & O. C.T.R.R.* v. *United States*, 583 F.2d 678, 684 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979).

Nothing in petitioner's extended attack on the EEOC's interpretation (Pet. Br. 32-41) lessens the weight to which it is entitled. The alleged inconsistencies between Questions and Answers 21 and 22, the Senate Report, and the EEOC's 1972 sex discrimina-

tion guideline (29 C.F.R. 1604.9(d)) to which petitioner points (Pet. Br. 33-36) are illusory. Answer 21 states that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." Answer 22 reiterates this principle, while making clear that "it is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees." Contrary to petitioner's claim (Pet. Br. 34-36), this position is obviously consistent with the statement in the Senate Report that the PDA "would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant." S. Rep. No. 95-331, *supra*, at 6; Leg Hist. 43. The thrust of both is that comparable insurance coverage must be provided to employees with respect to their own coverage, and with respect to that provided to their families.

The opening clause of 29 C.F.R. 1604.9(d), which prohibits unequal treatment of employees with respect to receipt of benefits for dependents,[34] is likewise

---

[34] Section 1604.9(d) provides in full that:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male

consistent with the Senate Report's emphasis on comparison between employees and not between employees and spouses. The guideline further states that it is unlawful "to make available benefits for the wives of male employees which are not made available for female employees," *e.g.*, to provide that "wives of male employees [will] receive maternity benefits while female employees receive no such benefits." This provision addresses an historical practice of invidious discrimination against women workers that the Senate Report also characterized as invalid under the PDA:

> Information presented to this committee revealed that * * * otherwise comprehensive medical plans have sometimes provided maternity coverage to wives of employees but not to women employees * * * which practice[] would clearly be invalid under this bill * * *.

S. Rep. No. 95-331, *supra*, at 6; Leg. Hist. 43.

Equally without merit is petitioner's argument that the Commission misapplied "existing Title VII principles" in explaining the rationale of Questions and Answers 21 and 22 at the time of their publication in final form (Pet. Br. 37-39). As we have shown (pp. 23-24, *supra*), petitioner's insistence that *Gilbert* "establishes the only pertinent 'Title VII principles'" (Pet. Br. 37) is erroneous.[35] Petitioner's additional

---

employees receive maternity benefits while female employees receive no such benefits.

[35] Petitioner also claims that our initial explanation of Questions and Answers 21 and 22, as incorporating existing Title VII principles, is "flatly contradicted" by our position here that spousal pregnancy coverage "is mandated * * * by the

charge that the Commission's position requiring equal benefits for employees of both sexes regardless of costs is an "anomaly" because, *inter alia*, the Department of Labor requires only equal benefits or contributions under the Equal Pay Act (Pet. Br. 37 and n.46), ignores the fact that this Court expressly rejected the Department of Labor's interpretation in *Los Angeles Dep't of Water and Power* v. *Manhart*, *supra*, 435 U.S. at 714 n.26.[36]

PDA itself." (Pet. Br. 39). This is plainly wrong. The rationale underlying our initial explanation, and which underlies our position in this Court, rests on substantive Title VII precepts operating in conjunction with our interpretation of the PDA, *i.e.*, that Title VII as amended by the PDA applies to all claims of discrimination, submitted by men or women, involving pregnancy, that dependent health coverage is a benefit for employees, and that lesser defendant coverage for employees of one sex than for those of the other sex is unlawful. See pp. 8-10, *supra*.

The fact that there are no pre-PDA cases in which the practice at issue here was litigated obviously does not mean, as petitioner suggests (Pet. Br. 40 n.49), that the practice was perceived as lawful. As Justice Brennan pointed out in his dissent in *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 155-158, the relationship between sex discrimination and pregnancy was "an admittedly complex problem" which the EEOC definitively resolved only in 1972. Four years later, this Court in *Gilbert* denied any such relationship even with respect to discrimination against women employees. The dearth of agency or judicial attention to discriminatory spousal pregnancy coverage under medical insurance plans is, therefore, understandable.

[36] The Department of Labor subsequently proposed amending its interpretation (29 C.F.R. 800.116(d)) to conform with the EEOC's requirement (29 C.F.R. 1604)—cited with approval in *Manhart* (435 U.S. at 720 n.37)—that benefits must be equal regardless of cost. See 46 Fed. Reg. 38029 (1981). Prior to publication of the amendment in final form, Equal

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

MICHAEL N. MARTINEZ
Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission

MARCH 1983

Pay Act enforcement authority was transferred to the EEOC, which has proposed the same amendment. See 29 C.F.R. 1620.5 (1981), 46 Fed. Reg. 43848, 43851 (1981). Petitioner's citation to the regulation of the Department of Labor's Office of Federal Contract Compliance Programs (Pet. Br. 37 n.48) similarly ignores the fact that that office has likewise proposed changing its regulation to require that fringe benefits for employees of both sexes must be equal. See 46 Fed. Reg. 42968, 42971 (1981) (41 C.F.R. 60-1.21); 41 C.F.R. 60-20.3(c) (1982).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 399777 1291

Supreme Court, U.S.
FILED
APR 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

ANDREW M. KRAMER
Counsel of Record
GERALD D. SKONING
DEBORAH CRANDALL
DAVID D. KADUE
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400
Attorneys for Petitioner

Dated: April 19, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	4
I. THE SHIPYARD'S PLAN, ON ITS FACE, DOES NOT VIOLATE § 703(a)(1), AS INTERPRETED UNDER "EXISTING TITLE VII PRINCIPLES"	4
II. THE SHIPYARD'S PLAN DOES NOT VIOLATE THE PDA	9
A. Spouses Cannot Be "Women Affected By Pregnancy"	11
B. Standing Alone, The PDA's First Clause Has No Meaning	12
C. The PDA's Legislative History Does Not Support The EEOC's Position	15
III. QUESTIONS AND ANSWERS 21 AND 22 ARE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 359 N.E.2d 393 (1976) 18
Brown v. GSA, 425 U.S. 820 (1976) 15
Brown v. Porcher, 502 F. Supp. 946 (D.S.C. 1980), *aff'd*, 600 F.2d 1001 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 796 (1983) 8
Califano v. Goldfarb, 430 U.S. 199 (1977) 7
deLaurier v. San Diego Unified School District, 588 F.2d 674 (9th Cir. 1978) 7
EEOC v. Emerson Electric Co., 539 F. Supp. 153 (S.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 10, 15, 19
EEOC v. Joslyn Manufacturing & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) 10
EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3485 (Dec. 15, 1982) (No. 82-1006) ..4, 10, 19
Frontiero v. Richardson, 411 U.S. 677 (1973) 7, 8
Geduldig v. Aiello, 417 U.S. 484 (1974) 7
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 6, 13, 19
Hilyer v. Morrison-Knudson Construction Co., 670 F.2d 208 (D.C. Cir. 1981), *cert. granted sub nom. Morrison-Knudson Construction Co. v. Director, OWCP*, 103 S. Ct. 49 (1982) 4
Illinois Bell Telephone Co. v. Fair Employment Practices Commission, 81 Ill. 2d 136, 407 N.E.2d 539 (1980) 8
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 4, 8
Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) 9
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 6, 7, 10
Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 5
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 11

TABLE OF AUTHORITIES—Continued

Page

Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982) 5
Rostker v. Goldberg, 453 U.S. 57 (1981) 8
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5
W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949) 5
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 7

Statutes:

Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1978) 1
42 U.S.C. § 2000e ..... *passim*
New York Insurance Code §§ 162-a, 164-a (McKinney Supp. 1982) 18

Legislative Materials:

S. Rep. No. 331, 95th Cong., 1st Sess. (1977) ..2, 11, 12, 14, 16, 18
H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978) 2, 11, 18
H.R. Rep. No. 1786, 95th Cong., 2d Sess. (1978) 11
Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* (Comm. Print 1980) ..... *passim*
Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977) 17, 18
Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977) 9, 17, 18
123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977) (remarks of Sen. Williams and Sen. Hatch) 15

TABLE OF AUTHORITIES—Continued

Administrative Materials: Page

44 Fed. Reg. 23,804-07 (1979) 9, 16
29 C.F.R. Part 1604 (Appendix) 16

Miscellaneous:

Health Insurance Association of America, *Source Book of Health Insurance Data 1981-82* (1982) .. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

INTRODUCTION

The health insurance plan ("Plan") provided for employees by Newport News Shipbuilding and Dry Dock Company ("the Shipyard") historically reimbursed employees for up to $500 of the hospitalization expenses incurred as a result of their own and their spouses' normal childbirths. *See* 37a (App.).[1] In compliance with the Pregnancy Discrimination Act ("PDA"), the Shipyard removed the $500 cap on reimbursable hospitalization expenses resulting from the normal childbirths of its em-

---

[1] References herein shall be in accordance with the following convention: to pages in the Appendix to the Petition for a Writ of Certiorari: —— (App.); to pages in the Joint Appendix: J.A. ——; to pages in the Brief on the merits filed by the Shipyard: S. Br. ——; to pages in the Petition for a Writ of Certiorari: Pet. ——; to pages in the Brief on the merits filed by the EEOC: EEOC Br. ——; to pages in the Brief filed by Amicus Curiae American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), *et al.*: AFL-CIO Br. ——; and to pages in the Brief filed by Amicus Curiae American Association of University Women ("AAUW"), *et al.*: AAUW Br. ——.

ployees. *Id. See also* Pet. at 8 n.7; 50a-51a (App.).[2] The Shipyard retained the $500 cap with respect to hospitalization expenses resulting from the normal childbirths of employees' spouses.[3]

The EEOC alleges that this Plan, on its face, constitutes intentional discrimination against male employees in violation of § 703(a)(1) because it fails to cover the childbirth-related hospitalization expenses of male employees' spouses to the same extent that it covers the hospitalization expenses of female employees' spouses and, therefore, provides less compensation to the Shipyard's

---

[2] The second clause of the PDA requires employers which provide health insurance for their employees to cover the pregnancy-related medical expenses of their female employees to the maximum extent that they cover any other medical risk for employees. *See* Report of the Senate Comm. on Human Resources, S. Rep. No. 331, 95th Cong., 1st Sess. 5 (1977), *as printed in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* [hereinafter, "Leg. Hist."] at 42 ("This bill would . . . require employers who provide medical benefits for their employees' own medical costs to cover the medical and hospital costs of pregnancy . . . of employees on the same terms applicable to other conditions for which employees are covered"); Report of the House Comm. on Education and Labor, H.R. Rep. No. 948, 95th Cong., 2d Sess. 6 (1978), Leg. Hist. at 152 ("There can be no special conditions placed as to the number of days or dollar amount unless that limitation applies to all disabilities covered by the medical benefits plan.").

[3] In this regard, it is noteworthy that women are hospitalized for uncomplicated pregnancies for an average of three days and that the average cost per day for a semi-private room in a hospital located in Virginia as of July 1981 was $120.15. Health Insurance Ass'n of America, *Source Book of Health Insurance Data 1981-82*, 66, 80 (1982). Thus, $500 is ample to cover most hospital stays resulting from normal pregnancies. It is also significant that the Shipyard's Plan covers all prenatal medical expenses for employees' spouses (J.A. 35), as well as 100% of the reasonable and customary charges for delivery and anesthesiologists (37a (App.)), all reasonable and customary pregnacy-related surgical costs, and 80% of the reasonable and customary charges for pregnancy-related medical expenses (Pet. at 7-9).

male employees than it provides to its female employees. *See* J.A. 29-30; EEOC Br. at 9-10.[4] In support of this allegation, the EEOC contends that Title VII prohibits discrimination against males as well as females and that health insurance is a fringe benefit. EEOC Br. at 8-9, 24, 39-40. The Shipyard contests neither of these propositions. Critically, however, the PDA has nothing to do with either of them.

The EEOC's primary argument with respect to the PDA is that its first clause incorporates into Title VII a broad statement of principle indicating that distinctions based on pregnancy, childbirth or related medical conditions are gender-based distinctions and, accordingly, that a health insurance plan which fails to provide reimbursement for the childbirth-related hospitalization expenses of male employees to the same extent that it provides reimbursements for other spousal hospitalization expenses is a *per se* violation of § 703(a)(1). EEOC Br. at 9-10, 12-13, 21 n.19. This analysis is flawed for three reasons. First, the PDA's first clause, as a definition, has no meaning except when read into one of Title VII's substantive provisions. *See* S. Br. at 10-11.[5] Second, when read into § 703(a)(1), which the Shipyard allegedly violated in this case, that clause makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions and privileges of employment because of *such individual's* . . . [pregnancy, childbirth, or related medical conditions]." By its terms, the PDA's first clause therefore has no application to a male employee's claim of "pregnancy"

---

[4] Under the EEOC's view of "existing title VII principles," the relevant points of comparison are the levels of benefits provided to male employees' spouses and to female employees' spouses. *See* EEOC Br. at 24 n.22, 38.

[5] The PDA's first clause reads as follows: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e-(k).

discrimination. *See EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243, 1245 (9th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3485 (Dec. 15, 1982) (No. 82-1006). The third flaw in the EEOC's PDA argument is that the PDA's first clause, even if it could be interpreted so as to apply to a male employee's § 703(a)(1) claim, did not eliminate the EEOC's burden of proving its allegation that the Plan constitutes discrimination "with respect to . . . compensation, terms, conditions, and privileges of employment" before a § 703(a)(1) violation can be found in this case.

ARGUMENT

I. THE SHIPYARD'S PLAN, ON ITS FACE, DOES NOT VIOLATE § 703(a)(1), AS INTERPRETED UNDER "EXISTING TITLE VII PRINCIPLES."

The Shipyard's Plan, on its face, does not discriminate against employees of either sex "with respect to . . . compensation." In terms of financial benefits, the Plan is worth different amounts to each employee. *See* S. Br. at 37-39, 43-47. The amounts actually received by any employee will vary with factors such as health, marital status, number of dependents, and age. *Id.* In no event will that amount depend on an employee's sex. *Id.*[6] Of course, both actual benefits and the contributions which maintain them are "compensation" under Title VII.[7] How-

---

[6] As the Court observed in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 710-11 n.20 (1978), differences in compensation based on a factor other than sex are immune from Title VII sex discrimination challenge because of the Equal Pay Act, 29 U.S.C. § 206(d), and "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. . . . [T]his Court has never held . . . that discrimination must always be inferred from such consequences."

[7] *See Manhart*, 435 U.S. at 712 n.23. *See also* Hilyer v. Morrison-Knudson Const. Co., 670 F.2d 208, 211, 213 (D.C. Cir. 1981), *cert. granted sub nom.* Morrison-Knudson Const. Co. v. Director, OWCP, 103 S. Ct. 49 (1982) (the "value" to an employee of an insurance policy is the employer's provision of the policy at no

ever, the Shipyard, as a self-insurer, makes no "contributions" to a third party to maintain its Plan and its per capita health insurance costs vary solely with the number and amount of reimbursable claims made. Any difference in its per capita costs, therefore, cannot be attributed to the factor of sex.

As proof that the Shipyard's Plan discriminates against male employees "with respect to . . . compensation" in violation of § 703(a)(1), the EEOC is content to rest on the bald assertion that the Plan "forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities." EEOC Br. at 9-10. This is plainly insufficient to establish a violation of § 703(a)(1). It certainly does not show that the Shipyard intended to treat its male employees less favorably than its female employees.[8] Nor does it accurately describe the Shipyard's Plan. Under the Shipyard's Plan, employees of both sexes must finance some of the expenses resulting from their spouses' disabilities. *See* S. Br. at 2-3, 3 n.5, 47. In addition, a male employee with a pregnant spouse may never incur any out-of-pocket costs. *See* S. Br. at 47.[9] The EEOC's theory of "compensation discrimination" would be unpersuasive in this case, moreover, even if it did accurately characterize the Plan. An indistinguishable theory of compensa-

---

cost to the employee—this value is appropriately measured by the amount of the employer's contributions); W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949).

[8] Because its complaint alleged intentional discrimination, the EEOC had the "ultimate burden of persuading the trier of fact that the . . . [Shipyard] *intentionally* discriminated against [its male employees]." Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added). Proof of discriminatory intent requires proof that the defendant selected a particular course of action "because of" and not merely "in spite of" its adverse effects upon an identifiable group. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979). *See also* Pullman-Standard v. Swint, 102 S. Ct. 1781, 1790-91 (1982).

[9] *See also* n.3, *supra*.

tion discrimination was found wanting in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See* S. Br. at 37-39, 47-49.

Apparently conceding that no difference in compensation is apparent on the face of the Shipyard's Plan (EEOC Br. at 23 n.21), the EEOC attempts to discount this problem by characterizing it as only an inability to show that the Plan has any discriminatory "effect" (EEOC Br. at 21 n.19). The EEOC thus asks the Court to hold that a compensation program can be found to be a *per se* violation of § 703(a)(1)'s sex discrimination ban even if, on its face, it does not discriminate against employees of either sex "with respect to . . . compensation." Such a conclusion would be contrary to the language of § 703(a)(1) and to all pertinent decisions of this Court.

The holding in *Gilbert* was based only partially on the conclusion that a pregnancy-related distinction is not gender-based. Its more fundamental conclusion was that the challenged compensation program did not, on its face or in fact, discriminate against female employees in violation of § 703(a)(1). 429 U.S. at 138-40. As explained in *Manhart*, the evidence in *Gilbert* showing that female employees received more benefits than men from the disability benefits program "supported the conclusion that . . . plaintiffs failed to establish a *prima facie* case by proving that the plan was discriminatory *on its face*." 435 U.S. at 715-16 (emphasis added). Justice Powell has also observed that "essential equality of *compensation* for comparable work is at the heart of § 703(a)(1)" and that the decision in *Gilbert* was "grounded primarily on the fact that no discrimination in compensation as required by § 703(a)(1) had been shown." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 152-53 n.6 (1977) (Powell, J., concurring) (emphasis in original).[10] Thus, it is mani-

[10] The observations of Justice Powell in *Satty* and of the Court in *Manhart* are reinforced by the views of Justices Stewart and Blackmun. In separate concurrences in *Gilbert*, these Justices

fest that a *per se* violation of § 703(a)(1)'s sex discrimination ban cannot be found absent a finding that the challenged compensation program, on its face, provides unequal compensation for male and female employees. No such finding has been or can be made in this case. *See* S. Br. at 37-39, 42-49.

The AFL-CIO argues that the Shipyard's Plan is unlawful on its face under principles of discrimination established in certain constitutional cases. *See* AFL-CIO Br. at 19-22 (citing *Califano v. Goldfarb*, 430 U.S. 199 (1977), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero v. Richardson*, 411 U.S. 677 (1973)).[11] *See also* EEOC Br. at 9 n.5. These cases are distinguishable from the instant case for two reasons. First, the male and female wage earners in each of those cases were similarly situated. Male and female employees are equally capable of having a non-dependent spouse (*Frontiero*), a surviving spouse (*Weinberger*), or a surviving non-dependent spouse (*Califano*). The male and female wage earners in this case, by contrast, are not similarly situated—only a male employee can have a pregnant

---

explained that General Electric's plan was not a *per se* violation of § 703(a)(1) and that, in the absence of a *per se* violation, the plaintiffs had the burden of establishing that the plan in fact had discriminatory effects. *See also Satty*, 434 U.S. at 141 ("there was no showing that General Electric's policy . . . favored men over women. No evidence was produced [in *Gilbert*] to suggest that men received more benefits from General Electric's disability insurance fund than did women."); deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 677 (9th Cir. 1978) ("The essential question . . . is not merely whether pregnancy is made a classifying factor, but whether discrimination has occurred").

[11] The AFL-CIO, of course, fails to analyze this case from the perspective of *Geduldig v. Aiello*, 417 U.S. 484 (1974), which is the only directly apposite case in that it deals both with an insurance plan and with the risk of pregnancy. In reaching its conclusion in *Geduldig*, the Court reasoned that the challenged disability program did not classify employees by sex, *id.* at 496-97 n.20, and, in any event, that it did not, on its face, treat female employees any differently than male employees, *id.* at 496-97.

spouse. Discrimination can occur only with respect to similarly situated individuals.[12] Second, the statutes involved in the constitutional cases, like the employment policy involved in *Manhart*, resulted in indisputable sex-based differences in treatment.[13] No such difference in treatment appears in this case.

On its face, the Shipyard's Plan treats all similarly situated employees the same, regardless of their sex: it identically insures male and female employees with respect to all spousal medical expenses which can be incurred by both. The Shipyard's male employees are not deprived of a single spousal benefit which flows to female employees. The Plan, in addition, provides female employees with coverage for the one risk that male employees do not face—it insures them against the risk that they will become pregnant.[14] It also provides male em-

---

[12] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 79 (1981); Ill. Bell Tel. Co. v. FEPC, 81 Ill. 2d 136, 407 N.E.2d 539 (1980) (failure to extend disability coverage to pregnancy does not constitute unlawful sex discrimination since men cannot become pregnant and, therefore, male and female employees are not similarly situated).

[13] The compensation scheme at issue in *Manhart* was a *per se* violation of § 703(a)(1) since, on its face, it resulted in different amounts of take home pay for male and female employees and because that difference was based solely on the factor of sex. *Frontiero* and its progeny are quite similar. In *Frontiero*, for instance, male wage earners with non-dependent spouses were entitled to a fringe benefit—an increased housing allowance, plus health insurance for their spouses—that was denied to female wage earners with non-dependent spouses, even though the male and female employees performed the same work.

[14] Viewed from the perspective of reimbursement for employees' own medical expenses, the Shipyard's Plan can be said to favor female employees in that it covers their pregnancy-related expenses —an additional risk—to the maximum extent that it covers any other medical expense. *But see* S. Br. at 38 n.47. This result, mandated by the PDA's second clause (*see* n.2, *supra*), is not what the EEOC is complaining about. *See* n.4, *supra*. Nor could it complain about this result. The PDA was remedial legislation enacted to benefit the female worker. *See* S. Br. at 10-26. *See also* Brown v.

ployees with coverage for the one *spousal* risk that female employees do not face—it insures them against the risk that their spouses may become pregnant and incur pregnancy-related medical expenses. Female employees are not insured against this spousal risk. Thus, at the spousal level of comparison relied upon by the EEOC, the Plan can be said to favor male employees, not female employees.

II. THE SHIPYARD'S PLAN DOES NOT VIOLATE THE PDA.

In an attempt to support the decision of the court below, the EEOC now argues that "the PDA . . . by its terms, reaches discrimination on the basis of dependent spouses' pregnancies" (EEOC Br. at 17 n.15) and that the PDA itself requires employers to treat the pregnancies of male employees' spouses the same as all other disabilities covered by their health insurance plans (EEOC Br. at 14 & 21 n.19). This is not what the EEOC alleged in its complaint. *See* J.A. 29-30. Moreover, this argument is directly at odds with the position taken by the EEOC in its explanation of Questions and Answers 21 and 22 in the Federal Register. *See* 44 Fed. Reg. 23,804 (1979), *quoted in* S. Br. at 36-37. It also contradicts the position taken by both the EEOC and the Department of Justice during the House hearings on the PDA bill.[15]

Porcher, 502 F.Supp. 946, 956 n.19 (D.S.C. 1980), *aff'd*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 796 (1983). Thus, the Shipyard cannot be faulted for complying with its terms even if that compliance may appear to favor female employees. *See* S. Br. at 30-31 and cases there cited. *See also* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981) (The Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances").

[15] *See Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on*

These inconsistencies are not the only problems plaguing the EEOC's new-found argument and the decision of the court below. The PDA was not meant to cover employees' spouses or in any way to affect an employer's Title VII obligations with respect to its male employees. *See* S. Br. at 13-26.[16] Nothing presented to the Court by the EEOC or its amici shows otherwise.

Education and Labor, 95th Cong., 1st Sess. (1977) [hereinafter, "House Hearings"] at 188 (statement of Issie Jenkins, EEOC Deputy General Counsel) (H.R. 5055 "would only apply to benefits for employees of the employer"); House Hearings at 187-88 (statement of Drew Days, Assistant Attorney General for Civil Rights) ("The bill is to equalize opportunities for employees. I don't understand that you reach dependents and whatever coverage there might be for dependents under plans").

[16] *See also Lockheed*; EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982); EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982).

The AFL-CIO posits that the Shipyard's arguments give different content to Title VII's prohibition on sex discrimination depending on whether male or female employees are injured. AFL-CIO Br. at 2. Similarly, the AAUW claims that under the Shipyard's construction of the PDA no male could ever challenge a pregnancy-based policy even if he were harmed by it and that acceptance of the Shipyard's construction of the PDA would bar every claim by men of sex discrimination based on pregnancy. AAUW Br. at 11-12. Both of these amici misunderstand the Shipyard's position. The Shipyard's argument is that male employees are neither "injured" nor "adversely affected" by a health insurance package which does not cover their spouses' childbirth-related hospitalization expenses to the maximum extent that it covers other spousal hospitalization expenses and that the PDA alters an employer's Title VII obligations in this regard only with respect to its female employees and female applicants for employment. This position does not bar pregnancy-related sex discrimination claims made by men. A refusal to hire men with pregnant spouses, for instance, may constitute a *prima facie* Title VII violation in that it imposes on men an employment-related burden that women need not face—absent proof that the employer's business necessitates such a practice, it may be deemed to deprive male employees of employment opportunities because of their sex (not because of pregnancy) in violation of § 703(a)(2). *Satty*, decided prior to enactment of the PDA,

A. Spouses Cannot Be "Women Affected By Pregnancy."

If spouses may be "women affected by pregnancy" and "other persons," as those phrases are used in the PDA's second clause, the PDA has revolutionized Title VII by proscribing for the first time employer behavior with respect to non-employees and non-applicants.[17] The legislative history of the PDA evidences no such intent.[18] In fact, even Senators Bayh and Cranston, whom the EEOC asserts correctly interpreted the PDA (EEOC Br. at 26-29), never asserted that the PDA itself would require employers to cover spouses' pregnancies. *See* S. Br. at 27-28.

---

makes it clear that the PDA was not necessary to make available § 703(a)(2) claims based on pregnancy-related barriers to employment opportunities "because of such individual's . . . sex." *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[17] The PDA's second clause provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e-(k). Because of this clause, employers must reimburse female *employees* for pregnancy-related medical expenses to the maximum extent that they reimburse employees for any other medical expenses. *See* n.2, *supra*. This is required regardless of whether or not a failure to do so constitutes a violation of § 703(a)(1).

[18] There can be no doubt that Congress intended the PDA's second clause to impose fringe benefit obligations with respect to female employees alone. When explaining the PDA's fringe benefit obligations, *all* of the congressional committees which reviewed the PDA defined the phrase "other persons" to mean "other employees." S. Rep. No. 331, 95th Cong., 1st Sess. 14, Leg. Hist. at 51; H.R. Rep. No. 948, 95th Cong., 2d Sess. 13, Leg. Hist. at 159; Report of the Comm. of Conference, H.R. Rep. No. 1786, 95th Cong., 2d Sess. 3 (1978), Leg. Hist. at 196. *See also* S. Rep. No. 331, 95th Cong., 1st Sess. 4, Leg. Hist. at 41; H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, Leg. Hist. at 149. Spouses therefore cannot be "other persons." Accordingly, since the Senate Report expressly states that S.995 would not require employers to treat spouses the same as employees (S. Rep. No. 331, 95th Cong., 1st Sess. 5-6, Leg. Hist. at 42-43), spouses simply cannot be "women affected by pregnancy."

In recognition of the fact that the PDA did not impose any requirements with respect to spouses, the Senate Report states that after enactment of the PDA, "the question would remain whether, under Title VII, the affected *employees* were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 331, 95th Cong., 1st Sess. 6, Leg. Hist. at 43 (emphasis added). If Congress had intended the PDA's second clause, or its first clause, for that matter, to mean that employers who provide medical benefits for employees' spouses must cover the pregnancy-related expenses of such spouses, the assertion in the Senate Report that the issue would remain open after enactment of the PDA makes no sense at all.

B. Standing Alone, The PDA's First Clause Has No Meaning.

Apparently recognizing that the court below went too far in concluding that spouses may be "women affected by pregnancy," the EEOC relies primarily on the PDA's first clause.[19] It argues that employers' medical benefits plans must cover spouses' pregnancies to the same extent that they cover other spousal disabilities, not because of the PDA's second clause, but because the PDA's first clause establishes a "broad statement of principle" indicating that "all discrimination among employees resulting from the different treatment of pregnancy-related conditions is sex discrimination prohibited by Title VII." EEOC Br. at 12-13. To support this proposition, the EEOC contends that Congress "amended the general definition section, so that the term 'sex discrimination' in-

---

[19] The EEOC virtually concedes that pregnant spouses are not "women affected by pregnancy" within the meaning of the second clause. While noting that the language used in that clause is not determinative (EEOC Br. at 14), the EEOC observes that the legislative history of the PDA "unequivocally state[s] that the . . . [second clause] 'specifically . . . define[s]' what treatment of pregnant *women workers* is mandated by . . . [the PDA]." EEOC Br. at 15 (emphasis added). *See also* AFL-CIO Br. at 14-15; AAUW Br. at 28-29.

cludes discrimination based on pregnancy" (EEOC Br. at 13 n.9). This, of course, is not what Congress did. What Congress did was to add a subsection to Title VII's definition section so that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e-(k). There would be no reason whatsoever to place the terms "because of sex" or "on the basis of sex" in quotation marks unless the definition set forth in the first clause were meant to be read into those parts of Title VII where such terms appear.[20]

The EEOC also argues that the Shipyard's interpretation reduces the PDA's first clause to the status of surplusage since, under the Shipyard's interpretation, the second clause alone is sufficient to protect female employees from pregnancy-based discrimination. EEOC Br. at 15-16. Yet, under the EEOC's interpretation, the

---

[20] The phrases "because of . . . sex" or "on the basis of . . . sex" are used in § 703(a)(1), § 703(a)(2), § 703(b), § 703(c)(1), § 703(c)(2), § 703(d), § 703(e), § 703(h), and § 703(j).

The fact that the PDA's first clause, when read into § 717, makes it unlawful for the Federal Government to engage in discrimination "based on . . . pregnancy," rather than "because of . . . such individual's . . . pregnancy" is neither "anomalous" nor "absurd." *See* EEOC Br. at 13 n.9. As the EEOC acknowledges, Congress enacted the PDA in reaction to *Gilbert*, which was a § 703(a)(1) case. Congress was not concerned with the personnel practices of the Federal Government. Indeed, as Justice Brennan observed in his dissent in *Gilbert*, federal employees subject to the jurisdiction of the Civil Service Commission were already eligible for maternity and pregnancy coverage under their sick leave program. 429 U.S. at 158 (Brennan, J., dissenting). In any event, the difference in language between § 703 and § 717 does not mean that "private employers may treat pregnancy in a way which disadvantages male employees, while the federal government may not." EEOC Br. at 13 n.9. By definition, a practice which "disadvantages" *male employees* does so "because of . . . sex" and, thus, may be found to violate § 703, as well as § 717.

PDA's second clause does no more than explain the effect of its first clause. EEOC Br. at 13.[21]

There is no indication that Congress intended the PDA's first clause to make it unlawful for an employer to discriminate against male employees "because of pregnancy." In fact, the Senate Report states that the question presented (where an employer provides medical benefits for employees' spouses) would entail an analysis of "whether, under title VII, the affected [male] employees were discriminated against on the basis of their *sex*," not on the basis of "pregnancy." *See* S. Rep. No. 331, 95th Cong., 1st Sess. 6, Leg. Hist. at 43 (emphasis added). Senators Bayh and Cranston also framed the question presented in a case such as this in terms of "sex discrimination," not "pregnancy discrimination." *See* S. Br. at 27-28. And, of course, the EEOC, in promulgating Questions and Answers 21 and 22, never once even intimated that its answers to those questions were based on the PDA's first clause or on any "broad" concept of "pregnancy discrimination." It claimed, instead, that those answers were based on pre-PDA Title VII principles—*i.e.*, discrimination with respect to compensation because of sex. *See* S. Br. at 36-37.

In any event, as shown above, the result in this case would be no different if the EEOC were correct that the PDA's first clause proscribes discrimination against male employees "because of pregnancy." Whether it alleges discrimination "with respect to . . . compensation" "because of pregnancy" or "because of sex," the EEOC still has yet to show any discrimination "with respect to . . . compensation" in this case.

---

[21] Of course, if the PDA's second clause is limited in scope to female employees (*see* n.19, *supra*), the EEOC's contention that it explains the effect of the first clause would mean that the first clause is also limited in scope to female employees. *See* S. Br. at 12-13 and cases there cited.

C. The PDA's Legislative History Does Not Support The EEOC's Position.

The EEOC cites *Brown v. GSA*, 425 U.S. 820 (1976), for the proposition that the Senate, by passing the PDA on the same day, "ratified" the views of Senators Bayh and Cranston on "the effect of the PDA on established Title VII principles." EEOC Br. at 29 n.28.[22] The Court in *Brown*, examining clear and consistent statements in the Senate report, the House report, and in floor remarks addressing the effect of proposed legislation upon the current state of the law, found an "unambiguous congressional perception" which left "little doubt" of the intended scope of that proposed legislation. 425 U.S. at 827-29. Here, even the remarks relied upon do not address the effect of the PDA upon the current state of the law. *See* S. Br. at 26-29. Moreover, the House report does not address the effect of the PDA on employees' spouses and the Senate Report does not support the avowedly personal views of Senators Bayh and Cranston as to the result of applying "existing Title VII principles" in a case such as this. The Senate Report does,

---

[22] In this regard, it is significant that it was also on this day that Senator Williams, the principal sponsor of S.995, told Senator Hatch that he was "satisfied that . . . this act only applies to the particular woman who . . . is an employee." 123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80. *See* S. Br. at 25-26. The EEOC's assertion that Senator Williams' comments during this colloquy were limited to the impact of the PDA on income maintenance plans (EEOC Br. at 28 n.27) totally ignores the following portion of the colloquy—the part that satisfied Senator Hatch:

> MR. HATCH: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?
>
> MR. WILLIAMS: Exactly.

123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80. That exchange is not limited to income maintenance plans. *See also Emerson Elec. Co.*, 539 F. Supp. at 157 n.3.

however, confirm the views of both Senators as to the scope of the proposed legislation with respect to the question presented in this case. That question, as acknowledged by Senators Bayh and Cranston, and by the authors of the Senate Report, is to be resolved in accordance with Title VII principles other than the PDA.

The EEOC's letters to Senator Javits also acknowledge this. The first letter begins with the premise that S.995 would require coverage only of employees' pregnancies. J.A. 45. It thereafter states that "general Title VII and Equal Pay Act principles would require coverage of similar costs imposed on male employees by virtue of the pregnancy of their wives. . . . On the other hand, the basic principles of Title VII would also be satisfied if medical insurance programs treated female employees and the wives of male employees equally with respect to pregnancy benefits." J.A. 46.[23] This position, which is not the position the EEOC takes today,[24] was soundly rejected by the authors of the Senate Report—"this bill would not mandate that women dependents be compared with women employees" (S. Rep. No. 331, 95th Cong., 1st Sess. 5-6, Leg. Hist. at 42-43)—and in the EEOC's Question and Answer 22—an employer need not "provide the same level of health insurance coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for its female employees." 29 C.F.R. Part 1604 (App.) (Question and Answer 22).[25]

The second letter represents a retreat from the position taken in the first letter. It states that, "our view that the additional medical insurance required by the bill

---

[23] There is no apparent difference between these purportedly alternative positions.

[24] *See* n.4, *supra*.

[25] *See also* 44 Fed. Reg. 23,805 (1979) ("Title VII does not require employers to provide the same coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for the pregnancy-related costs of its female employees").

for female employees would be required for the wives of male employees . . . would not apply where the employer offers health insurance to employees only." J.A. 48. There is no evidence that this view was communicated to any member of Congress other than Senator Javits. And, if it was communicated by Senator Javits to the Senate Committee, it was rejected. The Senate Report states in no uncertain terms that the question of dependents' pregnancy benefits remains an open one where employers' medical benefits plans cover dependents.

The cost estimates relied upon by the EEOC are similarly unhelpful to its argument. The EEOC observes that the Department of Labor ("DOL") submitted a report which stated that precise data on costs could not be estimated because, "[p]ublished data . . . with information on dependents' health care coverage are only available through 1970. Thus, this coverage would have to be extrapolated to 1976 with . . . significant further adjustments to assess costs for dependents."[26] This statement indicates that DOL believed that dependents' health care costs would have to be deleted when the extrapolation was completed, not, as the EEOC apparently believes (EEOC Br. at 30-31, 34), that they would have to be included. If DOL believed that dependents' health care costs were to be included, simple extrapolation of the 1970 figures, which included dependents' costs, would have been enough.

The EEOC also relies on cost estimates prepared by the American Council of Life Insurance ("ACLI"). The ACLI used the number of women in the childbearing population, rather than the number of female workers, in preparing its estimates of the PDA's medical benefits

---

[26] EEOC Br. at 31 (quoting *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) [hereinafter, "Senate Hearings"] at 563-64; House Hearings at 182).

costs because it thought that the PDA, like New York's insurance law, would require employers which provide health insurance for their employees to treat alike the pregnancies of all women covered by that insurance. Senate Hearings at 425-26; House Hearings at 96-98.[27] ACLI Vice President Richard Minck made a statement to this effect in his testimony. *See* House Hearings at 120-21. The EEOC's assertion that Mr. Minck's view is an "uncontradicted interpretation of the bill's scope" (EEOC Br. at 30) is belied by its own view of the PDA —the EEOC's argument is that the PDA requires all spouses to be treated alike, not that the PDA requires employers to treat alike the pregnancies of all women covered by their insurance plans.[28]

---

[27] New York's insurance law requires all health insurance policies issued for delivery or delivered in the state to cover costs of normal pregnancies (for the insured and all dependents) to the same extent that they cover costs for any illness or disease. *See* S. 10536, Chap. 843, laws of 1976, as codified at N.Y. Ins. Code §§ 162-a, 164-a (McKinney Supp. 1982). It also provides that coverage for normal pregnancies "may be limited to reimbursement of covered expenses . . . for a period of four days of hospital confinement." *Id. Cf.* n.2, *supra*. The Senate Report faulted the ACLI's cost estimates, which were based on experience under New York's insurance law, as "demonstrably too high" because the PDA would not "require . . . insurance coverage for maternity under all plans administered by insurance companies." S. Rep. No. 331, 95th Cong., 1st Sess. 9, Leg. Hist. at 46. At the same time, it cited Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 359 N.E.2d 393 (1976), for the proposition that some states had already "refused to adopt the approach taken . . . in . . . *Gilbert*." S. Rep. No. 331, 95th Cong., 1st Sess. 10, Leg. Hist. at 47. *See also* S. Br. at 22; H.R. Rep. No. 948, 95th Cong., 2d Sess. 11, Leg. Hist. at 157 (PDA would have "little or no economic impact" in states where the state FEP law, and/or the state disability law, already require coverage for "pregnant disabled workers").

[28] *See* n.4, *supra*. *See also* n.15, *supra*; 29 C.F.R. Part 1604 (App.) (Questions and Answers 21 and 22).

III. QUESTIONS AND ANSWERS 21 AND 22 ARE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The EEOC hopes to convince the Court that Questions and Answers 21 and 22 constitute its "contemporaneous" interpretation of the PDA. EEOC Br. at 37. In an attempt to explain why it advised the public in 1979 that Questions and Answers 21 and 22 were *not* an interpretation of the PDA (*see* S. Br. at 35-37), the EEOC now asserts that they are based on "substantive Title VII precepts operating in conjunction with our interpretation of the PDA." EEOC Br. at 39-40 n.35.

These regulations are invalid regardless of what they purport to interpret. If based on existing Title VII principles, they are invalid because those principles do not support them. *See* pp. 4-7, *supra*; S. Br. at 36-39, 41-49. *See also Lockheed*, 680 F.2d at 1246 n.3. If based on the PDA, they are contrary to the intent of Congress. *See* pp. 9-14, *supra*; S. Br. at 9-31. *See also Emerson Electric Co.*, 539 F. Supp. at 156. In enacting the PDA, Congress, like Justice Brennan in his dissent in *Gilbert*, was concerned with the impact of certain employers' pregnancy policies on women's careers. *See Gilbert*, 429 U.S. at 158-60 (Brennan, J., dissenting). *See also* S. Br. at 14-19. It was not concerned with male employees or their dependent spouses.

CONCLUSION

The Shipyard submits that the foregoing points and authorities, together with those set forth in the Brief for Petitioner, mandate reversal of the decision of the court below.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY

ANDREW M. KRAMER
Counsel of Record
GERALD D. SKONING
DEBORAH CRANDALL
DAVID D. KADUE
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 463-2400
Attorneys for Petitioner

Dated: April 19, 1983

[THIS PAGE INTENTIONALLY LEFT BLANK]

No. 82-411

Office-Supreme Court, U.S.
FILED
MAR 1 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR DEMOCRATIC ACTION, EQUAL RIGHTS ADVOCATES, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BAR ASSOCIATION -- WOMEN'S DIVISION, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, NATIONAL WOMEN'S POLITICAL CAUCUS, WOMEN EMPLOYED, WOMEN FOR RACIAL AND ECONOMIC EQUALITY, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND,

As Amici Curiae
In Support of Respondent

JUDITH E. SCHAEFFER
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

JUDITH L. LICHTMAN
(Counsel of Record)
DONNA R. LENHOFF
Women's Legal Defense Fund
2000 P Street, N.W.
Washington, D.C. 20036
(202) 887-0364

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	10
I. INTRODUCTION	10
II. IN ENACTING THE PREGNANCY DISCRIMINATION ACT, CONGRESS INTENDED THE REASONING UPON WHICH THE GILBERT DECISION WAS BASED TO HAVE NO CONTINUING VALIDITY UNDER TITLE VII	12
A. Congress' Decision to Amend the Definitions Section of Title VII Demonstrates its Comprehensive Rejection of the Gilbert Court's Rationale	17
B. The Language of the PDA Provides No Support for the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment	25
C. Nothing in the Legislative History of the PDA Supports the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment	33

Page

III. PETITIONER'S MEDICAL BENEFITS PLAN UNLAWFULLY TREATS MALE EMPLOYEES LESS FAVORABLY THAN THEIR FEMALE COUNTERPARTS..... 42

A. "Basic Principles of Title VII Law" Govern Claims by Men, Claims of Discrimination in Fringe Benefits, and Claims Involving Spousal Benefits..... 43

B. Application of Title VII as Amended by the PDA Invalidates Petitioner's Medical Benefits Plan..... 47

CONCLUSION..... 49

TABLE OF AUTHORITIES

Page

CASES:

Califano v. Goldfarb, 430 U.S. 199 (1977) 45

Califano v. Webster, 430 U.S. 313 (1977) (per curiam) 24

City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) 14,44

Colautti v. Franklin, 439 U.S. 379 (1979) 27

County of Washington v. Gunther, 452 U.S. 161 (1981) 25

Diaz v. Pan Am. World Airways Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971) 22

Dothard v. Rawlinson, 433 U.S. 321 (1977) 22

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) 16,17

EEOC v. Lockheed Missile and Space Co., 680 F.2d 1243 (9th Cir. 1982), petition for cert. filed, No. 82-1006, (Dec. 15, 1982)..... 15

Frontiero v. Richardson, 411 U.S. 677 (1973) 45

General Electric Co. v. Gilbert, 429 U.S. 125 (1976)..... passim

Haber v. Klassen, 540 F.2d 220 (6th Cir. 1976) (per curiam) 21

Page

Hicks v. ABT Assoc., 572 F.2d 960 (3d Cir. 1978) 21

Kahn v. Shevin, 416 U.S. 351 (1974) ... 24

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 21,31

Mississippi University for Women v. Hogan, ___ U.S. __, 102 S. Ct. 3331 (1982) 24

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 42

Newport News Shipbuilding and Dry Dock Co. v. EEOC, 667 F.2d 448, aff'd en banc, 682 F.2d 113 (4th Cir. 1982) (per curiam) 16,29

North Haven Board of Education v. Bell, __ U.S. __, 102 S. Ct. 1912 (1982) 19

Orr v. Orr, 440 U.S. 268 (1979) 24

Saunders v. Hercules, Inc., 510 F. Supp. 1137 (W.D. Va. 1981) 21,22

Schlesinger v. Ballard, 419 U.S. 498 (1975) 24

Stanton v. Stanton, 421 U.S. 7 (1975) 24

United States v. Hutcheson, 312 U.S. 219 (1941) 16-17
30

United States v. Menasche, 348 U.S. 528 (1955) 27

Page

United Steelworkers v. Weber, 443 U.S. 193 (1979)..... 21,23

Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981) 44

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)..... 45

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980)..... 24,45

Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980)..... 21

STATUTES:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq. (1981)..... passim

Section 701(k), 42 U.S.C. §2000e(k)..... 18,19

Section 702, 42 U.S.C. §2000e-1..... 20

Section 703, 42 U.S.C. §2000e-2..... 20,22 29,44

Section 704, 42 U.S.C. §2000e-3..... 20

Education Amendments of 1972, Title IX, 20 U.S.C. §1681 et seq. (1978)..... 19,46

Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076..... passim

LEGISLATIVE MATERIALS:

S. 995, 95th Cong., 1st Sess. (1977) 13

Page

H.R. 5055, 95th Cong., 1st Sess. (1977), later amended and reintroduced as H.R. 6075, 95th Cong., 1st Sess. (1977)..... 13

S. Rep. No. 331, 95th Cong., 1st Sess. (1977)..... 13,14 15,21 28,32 36-37 38,41

H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978)..... 13,14 15

123 Cong. Rec. (1977):

pp. 7539-40..... 15

p. 7541..... 15

p. 29641-42..... 15

p. 29642..... 32,36

p. 29663..... 36

123 Cong. Rec. (daily ed. Sept. 16, 1977):

p. S15037..... 40,46

p. S15038-39..... 36

p. S15058..... 40,41

124 Cong. Rec. (daily ed. July 18, 1978):

p. H6863..... 15

p. H6865..... 15

124 Cong. Rec (daily ed. Oct. 13, 1978)

p. S18978 35

Page

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (April 6 and June 29, 1977)..... 13

REGULATIONS:

29 C.F.R. §1604.9(d)..... 44

29 C.F.R. §1604.10..... 42

BOOKS AND PERIODICALS:

2A C. Sands, Statutes and Statutory Construction §47.11 (4th ed. 1972)..... 20

Note, "Spousal Benefits Under the Pregnancy Discrimination Act", forthcoming in 50 George Washington L. Rev. __ (August 1982)..... 38

No. 82-411

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR DEMOCRATIC ACTION, EQUAL RIGHTS ADVOCATES, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BAR ASSOCIATION -- WOMEN'S DIVISION, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, NATIONAL WOMEN'S POLITICAL CAUCUS, WOMEN EMPLOYED, WOMEN FOR RACIAL AND ECONOMIC EQUALITY, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND,

As *Amici Curiae*
In Support of Respondent

INTEREST OF AMICI CURIAE

This Brief amici curiae in support of respondent is submitted on behalf of the American Association of University Women, the American Civil Liberties Union, Americans for Democratic Action, Equal Rights Advocates, the League of Women Voters of the United States, the Mexican American Legal Defense and Education Fund, the National Bar Association -- Women's Division, the National Organization for Women, the National Women's Law Center, the National Women's Political Caucus, Women Employed, Women for Racial and Economic Equality, the Women's Equity Action League, the Women's Law Project, and the Women's Legal Defense Fund.*/

---

*/ Amici have obtained the written consent of both parties to the filing of this Brief; copies of the letters setting forth such consent have been filed with the Clerk of the Court.

Amici are private non-profit organizations committed to equal employment opportunity for women and men. Their efforts to achieve that goal include public education, legal representation, and advocacy as to public policy and legislation. Amici all believe that this case presents issues of major significance to the interpretation of the Pregnancy Discrimination Act ("PDA") and to the equal employment rights of men and women. Many of the present amici were part of a broad-based coalition of groups that worked for this legislation. One of their major goals in supporting this legislation was to ensure that the rationale of General Electric Co. v. Gilbert, 429 U.S. 125 (1976), was replaced by the more "common sense" notion that pregnancy-based classifications are sex-based classifications, in whatever employment-related context they occur. Amici are concerned that a holding that the Gilbert rationale survives in any way would sanction an exception to the broad

nondiscrimination principle embodied in Title VII of the Civil Rights Act and would undermine the entire purpose and spirit of that statute and of the Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

I. This case, the first before this Court involving the 1978 Pregnancy Discrimination Act ("PDA") amendment to Title VII of the Civil Rights Act of 1964, involves a claim of sex-based discrimination against male employees in an employer-provided hospitalization and medical-surgical insurance plan. Petitioner's plan limits the hospitalization benefits receivable for the pregnancy-related expenses of the spouses of male employees, but contains no such limitation for any class of benefits receivable for the spouses of female employees. The gravamen of the male employees' sex discrimination claim is that this disparity in the benefits that employees receive for their spouses necessarily reflects unlawful sex-based discrimination against the male employees themselves.

II. Insisting that this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), governs claims of pregnancy-based discrimination by men, petitioner urges this Court to disregard the will of Congress as expressed in its unambiguous rejection of that decision's interpretation of sex discrimination under Title VII. Congress' intent that there be no exceptions to its interpretation is conclusively demonstrated by its decision to enact the PDA in the form of a definitional amendment to Title VII, to clarify that pregnancy-related discrimination constitutes unlawful sex discrimination under that statute; indeed, Congress could not have intended an exception to that broad definition for claims by men because such an exception would be contrary to the entire underlying purpose and structure of Title VII.

Moreover, the language of the definitions section supplied by the PDA contains

no support for creating any exception to the broad definition emboided in its first clause, nor does the apparent reference in the second clause of that section to women who work necessarily limit the reach of the first clause to claims by women. By attempting to read the language of the PDA alone as providing the entire basis for claims of pregnancy discrimination, petitioner misses the point of Title VII and of this case.

Finally, the legislative history directly contradicts petitioner's position. The various references to the plight of female workers affected by pregnancy discrimination do not preclude claims by male workers so affected, and the references to the specific problem at issue here -- medical benefits plans that cover employees' spouses -- all support the holding that petitioner's practice is unlawful. In particular, the Senate Human Resources Committee instructed

that the lawfulness of such plans would be measured by "basic principles of Title VII law." The Committee assumed that application of such principles, which could not include the Gilbert rationale, would invalidate such plans.

III. The basic Title VII principles relevant to this case are three: first, that Title VII's prohibition of sex discrimination is even-handed, and extends to discrimination against men as well as against women; second, that employer-provided medical benefits plans are a form of employment-related treatment within the purview of that statute; and third, that benefits plans that affect male and female employees' spouses differently are a form of disparate treatment as to the employees themselves and therefore also fall within the purview of Title VII. Application of these principles, in conjunction with the PDA's principle that pregnancy-related discrimination constitutes

sex discrimination, compels the holding that petitioner's imposition of a flat-rate ceiling for pregnancy benefits for male employees' spouses with no similar ceiling for any benefits for female employees' spouses violates Title VII.

ARGUMENT

I. INTRODUCTION

This case involves sex-based employment discrimination against men. Petitioner's Hospitalization and Medical-Surgical Plan (the "Plan"), which provides comprehensive hospitalization benefits for employees, their spouses, and certain dependents, contains a flat-rate ceiling on spousal hospitalization benefits for only one covered condition -- normal pregnancies. Thus, petitioner's male employees, such as John McNulty, the original charging party in this case, receive less complete coverage for their spouses than do petitioner's female employees. Male employees are forced to bear their spouses' hospitalization costs for a substantial class of medical conditions; female employees are faced with no such gap in hospitalization coverage for their spouses.

Petitioner argues that the lawfulness of this practice is not governed by Title VII as amended by the Pregnancy Discrimination Act, but by this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). According to petitioner, only those Title VII sex discrimination claims brought by women employees or applicants for employment are affected by the Pregnancy Discrimination Act. Under petitioner's theory, no male could ever challenge a pregnancy-based policy even if he were harmed by it. For the reasons discussed below, the reasoning upon which the Gilbert decision was based has no continuing validity under Title VII. Petitioner's practice, properly evaluated under Title VII as amended by the Pregnancy Discrimination Act, unlawfully discriminates against men.

II. IN ENACTING THE PREGNANCY DISCRIMINATION ACT, CONGRESS INTENDED THE REASONING UPON WHICH THE GILBERT DECISION WAS BASED TO HAVE NO CONTINUING VALIDITY UNDER TITLE VII.

In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this Court considered an "important issue in the construction of Title VII [of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (1981)]"[1/] -- whether pregnancy-based discrimination is a form of sex discrimination unlawful under that statute -- and decided that it was not. The underlying rationale of Gilbert was that pregnancy-based distinctions are not equivalent to distinctions based on gender "as such," since they divide a population into "pregnant women and nonpregnant persons."[2/]

Congress, disagreeing with the Court's statutory construction, responded promptly

---

1/ 429 U.S. at 133.

2/ Id. at 135.

with the introduction in each House of bills to overturn the Court's interpretation.[3/] The bills enjoyed widespread Congressional and public support[4/] and were considered thoroughly in extensive hearings and debate.[5/] The resulting legislation --

---

3/ S. 995, 95th Cong., 1st Sess. (1977); H.R. 5055, 95th Cong., 1st Sess. (1977), later amended and reintroduced as H.R. 6075, 95th Cong., 1st Sess. (1977).

4/ S. 995 was reported out of Committee with 29 co-sponsors. H.R. 5055 was introduced with 82 co-sponsors, and was reported out of Committee with 119 co-sponsors. S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978) [hereafter cited as "Senate Report" and "House Report", respectively]. The legislation was supported by a wide range of organizations, including the AFL-CIO, the American Citizens Concerned for Life, the League of Women Voters of the United States, and the NAACP. See Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 62, 198, 265 (1977) (statements of Laurence Gold, Special Counsel, AFL-CIO; Clarence Mitchell, Director, NAACP; and the League of Women Voters of the United States, respectively); Id., Part 2 at 63 (statement of Dorothy Czarnecki, American Citizens Concerned for Life).

5/ Hearings were held in the House on April 6 and June 29, 1977, and in the Senate on April 26, 27, and 29, 1977.

the Pregnancy Discrimination Act ("PDA")[6/] -- was signed into law on October 31, 1978.[7/]

As articulated by the Senate Human Resources Committee, the purpose of the legislation was simple but comprehensive: to "make clear that the prohibitions against sex discrimination in [Title VII] include discrimination in employment on the basis of pregnancy or pregnancy related disabilities."[8/] Both Houses stated explicitly that the legislation was intended to clarify that the "commonsense" views expressed by the dissenters in Gilbert "correctly express

---

6/ Pub. L. No. 95-555, 92 Stat. 2076.

7/ Even prior to passage of the PDA, this Court's decision in City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 725 (1978), appeared to cast doubt on the continuing validity of Gilbert. (Manhart "cuts back on General Electric...and, indeed, makes the recognition of [that case] as continuing precedent somewhat questionable") (Blackmun, J., concurring in part and in the judgment).

8/ Senate Report, supra note 4, at 1. Accord, House Report, supra note 4, at 1.

both the principle and the meaning of Title VII."[9/]

Nevertheless, petitioner and supporting amici in the instant case insist that there is still life to the rejected Gilbert reasoning. They contend that the PDA applies solely to challenges by female employees or applicants for employment,[10/] and thus urge the Court to resurrect the Gilbert rationale for all but that limited class of cases. But, to quote the court below, the PDA cannot be read "so narrowly as to

---

9/ Senate Report, supra note 4, at 2. Accord, House Report, supra note 4, at 2. Members of Congress repeatedly expressed disagreement with the rationale underlying the Gilbert decision. E.g., 123 Cong. Rec. 7539-40 (1977) (remarks of Sen. Williams); id. at 7541 (Sen. Brooke); id. at 29641-42 (1977) (Sen. Bayh); 124 Cong. Rec. H6863 (daily ed. July 18, 1978) (Rep. Hawkins); id. at H6865 (Rep. Green).

10/ The court in EEOC v. Lockheed Missiles and Space Co., 680 F.2d 1243, 1246 (9th Cir. 1982), petition for cert. filed, No. 82-1006 (Dec. 15, 1982), took a similar position. ("PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees.")

overturn the specific holding in Gilbert without affecting the reasoning upon which it was based." Newport News Shipbuilding and Dry Dock Co. v. EEOC, 667 F.2d 448, 451, aff'd en banc, 682 F.2d 113 (4th Cir. 1982) (per curiam). The assertion that the Gilbert rationale survives in any class of cases disregards Congress' repeated expressions of dissatisfaction with that decision.11/

11/ See note 9, supra. As this Court has recognized, once the legislature has "intimated its will. . .that will should be recognized and obeyed." United States v. Hutcheson, 312 U.S. 219, 235 (1941) (citation omitted). In Hutcheson, as in this case, the Court was faced with construction of a statute intended to overturn a prior Supreme Court statutory interpretation, and a party urged continued life to the rejected precedent. Congress had previously provided antitrust immunity for certain labor activity, but a decision of this Court, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), had interpreted that immunity restrictively to apply only to trade union activities directed against an employer by his own employees. To correct this interpretation, Congress enacted the Norris-LaGuardia Act and "defined its conception of a 'labor dispute' in terms that no longer leave room for doubt." Hutcheson, 312 U.S. at 234. Nevertheless, the Government in Hutcheson argued that the

(footnote cont'd)

The will of Congress -- that the interpretation of sex discrimination underlying the Gilbert decision have no continuing validity under Title VII under any circumstances -- is demonstrated by the structural placement of the PDA in Title VII, by the language of the PDA, and by its legislative history. We will treat these arguments sequentially.

A. Congress' Decision to Amend the Definitions Section of Title VII Demonstrates its Comprehensive Rejection of the Gilbert Court's Rationale.

The Gilbert decision rested on the premise that pregnancy discrimination[12/] is not sex discrimination per se under Title

---

(footnote cont'd)

discredited Duplex case "still govern[ed]" in the context of a criminal prosecution. This Court soundly rejected this attempt to resurrect the precedent and restrict the new law as contrary to "the will of Congress."

12/ As used herein, "pregnancy discrimination" refers to discrimination on the basis of pregnancy, childbirth, and related medical conditions.

VII.[13] In enacting the PDA, Congress chose the most direct means of rejecting the Court's premise -- it amended the definitions section of Title VII to clarify that pregnancy-based classifications are sex-based classifications as a matter of law.[14] The fact that the PDA is in the form of a definition negates petitioner's contention that it "applies" only to claims of female employees or applicants for employment.[15] Since a definition by its very nature and purpose applies generally throughout a

---

13/ The Court did recognize that a pregnancy-related distinction would be unlawful if it were a pretext for sex discrimination, or if a gender-based effect were shown. 429 U.S. at 135-37. Since the PDA clarifies that a pregnancy classification is a sex-based classification as a matter of law, the questions of "pretext" and "effect" are not at issue here.

14/ The PDA amended the definitions section of Title VII to add a new subsection, §701(k), 42 U.S.C. §2000e(k) (1981), which explains that sex discrimination includes, but is not limited to, discrimination on the basis of pregnancy, childbirth, and related medical conditions.

15/ Brief for Petitioner ("Pet. Br.") at 10-13.

statute, Congress could only have intended that §701(k) apply to all claims of unlawful sex discrimination under Title VII, including those made by men. By amending Title VII in this manner, Congress avoided the impossible task of attempting to enumerate all conceivable manifestations of the problem it wished to address.

If Congress had intended to limit pregnancy discrimination claims to women employees and applicants, it would have done so by adding an unambiguous proviso or exception to Title VII.[16/] This is particularly so given the structure of that statute. The substantive core of Title VII is the general

---

16/ Cf. North Haven Board of Education v. Bell, ___ U.S. ___, 102 S. Ct. 1912, 1918 (1982), in which this Court interpreted Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (1978), as not limited to claims by students or beneficiaries. ("Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of §901(a).")

prohibition against discrimination set forth in §§703 and 704 of the statute;[17] without exception, defenses or limitations to this broad prohibition are set forth explicitly in specific provisos or exemptions.[18] Thus, no other exceptions can be implied.[19]

17/ 42 U.S.C. §§2000e-2 and 2000e-3 (1981). The remaining sections of the statute determine the scope of this general prohibition and establish the mechanisms for its enforcement. It is against the statute's general prohibition of employment discrimination that the courts measure the lawfulness of particular employment-related practices.

18/ See, e.g., §702, 42 U.S.C. §2000e-1 (1981) (exemption for religious preferences by religious corporation) ("This subchapter shall not apply"); §703(e), 42 U.S.C. §2000e-2(e) (1981) (BFOQ defense and exemption for religious preference for religious schools) ("Notwithstanding any other provision of this subchapter"); §703(i) 42 U.S.C. §2000e-2(i) (1981) (preferences for Indians on Indian reservations) ("Nothing contained in this subchapter shall apply"). Indeed, Congress added such an unambiguous exception in the PDA itself, with regard to health insurance coverage for certain abortions.

19/ "Especially where there is an express exception, it comprises the only limitation on the operation of the statute and no exceptions will be implied." 2A C. Sands, Statutes and Statutory Construction §47.11 (4th ed. 1972).

Furthermore, establishment of an exemption to Title VII's ban on sex discrimination for a certain class of claims by male employees would contradict the basic principle of even-handed nondiscrimination embodied in that statute.[20/] It is well-established that Title VII's prohibition of sex discrimination covers claims by men as well as by women, just as its prohibition of race discrimination covers claims by whites as well as by blacks.[21/] Even the explicit

---

20/ This principle is one of the "existing Title VII principles" by which the Senate Human Resources Committee instructed that the question of the validity of spousal benefits plans "would be determined." Senate Report, supra note 4, at 6. See infra at 36-42.

21/ See, e.g., McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980), and Haber v. Klassen, 540 F.2d 220 (6th Cir. 1976) (per curiam) (claims of race discrimination by whites); Hicks v. ABT Assoc., 572 F.2d 960 (3d Cir. 1978) (claim of race and sex discrimination by white male); Saunders v. Hercules, Inc., 510 F. Supp. 1137 (W.D. Va. 1981) (claim of sex discrimination by a male). Cf. United Steelworkers v. Weber, 443 U.S. 193 (1979) (race discrimination challenge to affirmative action plan by a white male).

statutory exemptions to the nondiscrimination standard must apply equally; e.g., an employer may assert a bona fide occupational qualification ("BFOQ") for a woman or for a man.[22/]

Petitioner argues that since the PDA was designed to benefit women, it applies only to Title VII claims by women, and bars every claim by men of sex discrimination based on pregnancy.[23/] Neither Congress nor this Court has ever sanctioned such a sweeping exception to Title VII's nondiscrimination principle.[24/]

22/ The BFOQ exception is found in §703(e)(1) of Title VII, 42 U.S.C. §2000e-2(e)(1) (1981). See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (BFOQ for men); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Saunders v. Hercules, 510 F. Supp. 1137 (W.D. Va. 1981) (BFOQ for women).

23/ Pet. Br. at 13-19.

24/ Under Title VII, explicit race- or sex-based treatment may be permissible on a case-by-case basis, if it is ordered by a court to remedy past discrimination or undertaken voluntarily by an employer to correct the result of past

(footnote cont'd)

We do not dispute that the primary goal of Congress in enacting the PDA was to relieve women employees and applicants of the burden of pregnancy discrimination; the legislative history is replete with references to this goal, and the catalyst for the PDA, the Gilbert decision, involved just such a situation. Similarly, the underlying goal of Title VII itself is to relieve blacks, ethnic and religious minorities, and women employees of the burdens of discrimination due to their membership in these classes. But as the courts have recognized, invidious discrimination may also be visited upon members of the usually more favored

---

(footnote cont'd)

discrimination. United Steelworkers v. Weber, 443 U.S. 193 (1979). Thus, the "affirmative action" doctrine could not provide the basis for sex-based treatment in an entire class of cases, as petitioner suggests.

classes, e.g., males.[25] Under Title VII, such discrimination is unlawful.[26]

Because the PDA amends Title VII, to the extent that men might be burdened by discrimination based on pregnancy, Title VII as amended by the PDA covers such discrimination. Indeed, Congress could not have intended that Title VII as amended by the PDA treat claims of pregnancy discrimination against men any differently than other

---

25/ Because sex discrimination policies are often the product of the "role-typing society has long imposed" upon the sexes, Stanton v. Stanton, 421 U.S. 7, 15 (1975), not only do they generally exclude women from the spheres traditionally reserved for men, but they also may exclude men from women's traditional roles. See, e.g., Mississippi University for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331 (1982) (men barred from nursing school); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (denial of worker's compensation to widowers without proof of dependency); Orr v. Orr, 440 U.S. 268 (1979) (men not entitled to be paid alimony).

26/ Therefore, Kahn v. Shevin, 416 U.S. 351 (1974), and other cases upholding "remedial" sex discrimination under the Constitution, e.g., Califano v. Webster, 430 U.S. 313 (1977) (per curiam), and Schlesinger v. Ballard, 419 U.S. 498 (1975), are inapposite.

claims of sex discrimination against men are treated under Title VII generally. At the very least, a "clear congressional mandate" would have been required to effectuate so major a departure from the theory underlying the statute to which the PDA was a simple definitional amendment.[27/]

B. The Language of the PDA Provides No Support for the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment.

In enacting the PDA, Congress intended to clarify the meaning of sex discrimination

---

27/ In rejecting a limitation to the broad scope of Title VII, this Court recently explained that:

> As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination....We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

under Title VII. The very first clause of that Act accomplishes the Congressional purpose by stating that:

> [t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . .

Nowhere on the face of this broad definition is the statute limited to Title VII claims brought by female employees or applicants for employment.

However, petitioner argues that the second clause of this sentence of the PDA --

> and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

-- restricts the reach of the broad definition articulated in the first clause to female employees or applicants for

employment.[28] There is no statutory basis for this contention. The use of the term "and" between the two clauses contradicts any suggestion that the second clause limits or subtracts from the broad sweep of the first. In addition, if petitioner's reading of the statute is followed, the second clause would cover the entire meaning and reach of the PDA; this would reduce the first clause to mere surplusage, "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."[29]

In the case of the PDA, the two clauses are not co-extensive, as petitioner construes them. Rather, the second clause serves the important function of

---

28/ Pet. Br. at 11-13.

29/ Colautti v. Franklin, 439 U.S. 379, 392 (1979) (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

demonstrating the application of the broad first clause to certain employment-related practices with which Congress was most concerned.30/ Congress wanted to ensure that the courts interpret Title VII as amended to prohibit employers from "treat[ing] pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions." Senate Report, supra note 4, at 4. Thus, the second clause sets forth a guiding principle for the courts to use in analyzing certain pregnancy discrimination claims by providing a "functional comparability" method of analysis. Application of this "functional comparability" analysis to pregnant employees -- concededly the focus of Congressional concern -- yields the result that when pregnant employees are able to work, they, like other employees

---

30/ E.g., the temporary disability plan presented in Gilbert and other practices that penalize women for being pregnant, such as forced maternity leave.

who are able to work, must be allowed to do so; however, when pregnant employees are unable to work, they must be afforded the same fringe benefits, including sick leave and temporary disability coverage, as are provided to other employees who are also unable to work.[31/] At the very least, therefore, the second clause illuminates the first; it certainly does not limit it.

Petitioner's main argument in support of its restrictive construction of the PDA is based on an attempted and mechanical substitution of the definitional language in the first clause for the term "because of sex" in §703(a)(1). Supposedly performing

---

31/ The court below applied this functional comparability standard of the second clause to this case, holding that its language is not limited to employees or applicants for employment, and that the reference to "ability or inability to work" "denotes disability." 667 F.2d 448, 451. Because Title VII as amended by the first clause is sufficient to invalidate petitioner's Plan, it is not necessary to reach the application of the second clause to this case.

such a substitution, petitioner then concludes that the pregnancy discrimination prohibited by this formulation is limited to discrimination because of an employee's own pregnancy, childbirth, or related medical conditions.[32/] Since men cannot become pregnant, reasons petitioner, they cannot make claims of pregnancy discrimination.

The short answer to this argument is that petitioner's substitution simply cannot be accomplished, since the phrases "because of sex" or "on the basis of sex" -- for which petitioner wishes to substitute the language of the PDA -- do not appear anywhere in Title VII. Petitioner's construction of the statute is made in "a spirit of mutilating narrowness"[33/] which misses the point of this case and ignores the central

---

32/ Pet. Br. at 10-11.

33/ United States v. Hutcheson, 312 U.S. 219, 235 (1941).

purpose of Title VII as amended by the PDA. No one is claiming that men can become pregnant. The point of this case is that pregnancy-based classifications may constitute sex-based classifications which unlawfully discriminate against men on the basis of their sex, not their pregnancies, as demonstrated infra, at 47-48. This Court has previously rejected the type of simplistic and mechanical reading of a civil rights statute which petitioner urges here and should do so in this case.[34/]

Petitioner's misunderstanding of this case, of Title VII, and of the PDA is demonstrated by its unsupported assumption that --

> [h]ad Congress wished to require employers' medical insurance plans to cover the pregnancies of male employees' spouses, it would have

---

34/ McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287 (1976).

> required fringe benefit plans covering the pregnancies of female employees to also cover the pregnancies of the wives of male employees.35/

In other words, petitioner assumes that Congress would have required equality of treatment between female employees and the spouses of male employees had it intended spousal benefits plans to cover pregnancies. From this assumption, petitioner concludes that since Congress expressly negated any intent to require pregnancy coverage for spouses of employees equal to that provided to female employees,36/ Congress could not have intended that Title VII as amended require coverage of the pregnancies of male employees' spouses under any circumstances.

35/ Pet. Br. at 30.

36/ See, e.g., Senate Report, supra note 4, at 5-6; 123 Cong. Rec. 29642 (1977) (statement of Sen. Bayh).

Petitioner's analysis is totally erroneous, for its assumption compares employees to non-employees (spouses), which, under Title VII, is an irrelevant comparison. The only valid comparison under that statute is between employees. The gravamen of this case is that petitioner's male employees are treated less favorably with respect to spousal hospitalization benefits than are petitioner's female employees.

C. Nothing in the Legislative History of the PDA Supports the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment.

Petitioner and supporting amici cite at length the many references in the legislative history of the PDA to Congress' desire to alleviate the burdens upon working women caused by pregnancy discrimination. They read these references as a limitation upon the PDA to claims raised by female employees

or applicants. The legislative history, however, is not so confining. Given the post-Gilbert context in which Congress was acting, its focus upon women workers is not at all surprising. However, that focus is no more indicative of an intent to exclude males from the coverage of the PDA than is a focus upon blacks in connection with a statute prohibiting race discrimination indicative of an intent to exclude whites from its coverage.37/ Nothing in Congress' focus upon women is inconsistent with the Fourth Circuit's holding that Title VII, as amended by the PDA, applies to claims of pregnancy discrimination by male employees.38/

37/ Nor does the fact that most of the legislative history of the PDA is focused upon employees rather than applicants for employment indicate an intent to exclude applicants. Yet petitioner does not dispute that Title VII as amended by the PDA covers pregnancy discrimination against applicants.

38/ Significantly, petitioner ignores the following remarks of Senator Williams which indicate that,

(footnote cont'd)

Moreover, these references to women workers simply do not illuminate Congressional intent with respect to the issue herein, i.e., the lawfulness of pregnancy discrimination in the provision of spousal health benefits. None of the legislative history specifically addressing this issue supports petitioner's position that the PDA is limited to claims by women; to the contrary, it supports the holding of the Fourth Circuit in this case.

(footnote cont'd)

under Title VII as amended by the PDA, childcare leave could not lawfully be denied to male employees if provided to female employees:

> The legislation would require only that the opportunity to take a parenthood leave to meet the requirements of childcare during early infancy be provided on a nondiscriminatory basis. Thus, it would be equally as valid to permit a man to take a voluntary leave for the purposes of childcare as it would be to permit a woman who had recently given birth to take a voluntary leave for that purpose.

124 Cong. Rec. S18978 (daily ed. Oct. 13, 1978).

The Senate Report addressed this issue at greatest length.[39/] Explaining how health insurance plans that cover spouses are to be treated under Title VII as amended by the PDA, the Report states in pertinent part that while

> the basic purpose of this bill is to protect women employees, it does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII

39/ Also, during the debate preceding Senate enactment, Senators Bayh and Cranston expressly took the position advocated by the EEOC here. 123 Cong. Rec. 29642 (1977) (remarks of Sen. Bayh); 123 Cong. Rec. 29663 (1977) (remarks of Sen. Cranston).

Petitioner relies on a colloquy between Senators Williams and Hatch during the Senate debate in which Senator Williams responded to Senator Hatch's questions about the scope of the PDA's coverage by indicating that it applies to women employees. 123 Cong. Rec. S15038-39 (daily ed. Sept. 16, 1977). This reliance, however, is misplaced, since a careful reading of the colloquy reveals that Senator Williams was referring throughout the dialogue only to application of the statute to income maintenance plans, which of course are provided to employees only. Health benefits, in contrast, cover medical and hospitalization costs, and are commonly provided to spouses and dependents of employees as well as to employees themselves.

> purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing Title VII principles.
>
> * * *
>
> Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

Senate Report, supra note 4, at 5-6 (emphasis added).[40/]

Petitioner contends that the "existing Title VII principles" referred to in this passage include those enunciated in Gilbert. This suggestion is "fundamentally incompatible with the PDA's legislative history,

---

40/ See also Senate Report, supra note 4, at 3-4.

which reflects Congress's displeasure with the Gilbert Court's analysis."[41/] Given that legislative history, it is at best a "dubious inference that Congress intended in any way to endorse Gilbert as applicable for any manifestation of employment-related pregnancy discrimination."[42/]

The only logical reading of the phrase "existing Title VII principles" is that it refers to the "basic principles of Title VII law" referred to earlier in the passage, namely, the well-developed body of law that governs claims under that statute.[43/] It

---

41/ Note, "Spousal Benefits Under the Pregnancy Discrimination Act", forthcoming in 50 George Washington L. Rev. __ (August 1982).

42/ Id. Also, the fact that the Senate Committee clearly viewed with disfavor such spousal benefits plans as petitioner's further undercuts any notion that the Committee intended the lawfulness of such plans to be judged according to the rationale of Gilbert. See Senate Report, supra note 4, at 6.

43/ As Congress well knew when it passed the PDA as an amendment to Title VII, the provisions of that statute have been the subject of extensive judicial

(footnote cont'd)

is absurd to suggest that these "basic principles" could include the Gilbert rationale, since the Committee explicitly stated that the bill does "not alter" those principles, and there can be no question that Congress meant to "alter" Gilbert.

According to the Committee, then, spousal benefits plans would be unlawful under Title VII as amended by the PDA if they were invalidated by application of basic Title VII principles, operating in conjunction with the clarified definition of sex discrimination. Furthermore, relying on the opinion of the Administration and on its own understanding of the relevant basic Title VII principles, the Committee assumed that application of such basic Title VII

(footnote cont'd)

and administrative interpretation and refinement since its original enactment in 1964. The "basic principles" relevant to this case are discussed infra, at 43-47.

principles would indeed invalidate such plans.44/

The Committee did not choose, however, to perform the entire analysis that would determine how discriminatory spousal medical benefits plans would fare under Title VII as

---

44/ Senator Javits, the ranking Republican on the Senate Human Resources Committee, had requested in writing the Administration's views on application of the legislation to spousal benefits plans and had received joint answers from the EEOC, the Department of Labor, and the Department of Justice expressing the view that absent changes in the language of the bill or its legislative history, general Title VII principles as amended by the PDA would require coverage of pregnancy-related medical costs of male employees' spouses if comprehensive spousal benefits are otherwise provided. See Brief for the Respondent in Response to the Petition for Certiorari, at 12-13, nn.14-15. A short time later the Committee issued the Report quoted above, without making any changes in the language of the bill or its legislative history.

On the Senate floor, Senator Cranston took the position that "such a plan would indeed be discriminatory." 123 Cong. Rec. S15058 (daily ed. Sept. 16, 1977). The only other Senator to address this question directly was Senator Bayh, who reached the same conclusion. 123 Cong. Rec. S15037 (daily ed. Sept. 16, 1977).

amended by the PDA. There are two reasons for the Committee to have made this choice. First, as has been noted above, Congress correctly believed that the primary burden of pregnancy discrimination falls upon women workers. As a result, the Committee in its deliberations concerned itself primarily with that aspect of such discrimination. At the same time, the Committee did not believe that plans like the one at issue here were a matter of great concern, since it assumed that such plans "are rare."45/ Thus, the Committee chose not to consider the question further, confident that the already-developed principles of Title VII law would determine the legality of such spousal

---

45/ Senate Report, supra note 4, at 6. Senator Cranston, a member of the Senate Human Resources Committee, confirmed that the presumed rarity of these plans prompted the Committee's decision not to "directly answer the question of whether such plans would be discriminatory under Title VII." 123 Cong. Rec. S15058 (daily ed. Sept. 16, 1977).

benefits plans, should the question ever arise.[46/]

III. PETITIONER'S MEDICAL BENEFITS PLAN UNLAWFULLY TREATS MALE EMPLOYEES LESS FAVORABLY THAN THEIR FEMALE COUNTERPARTS.

While the Senate Report chose not to analyze further the question of the lawfulness of such plans as petitioner's, the conclusion that petitioner's Plan is invalid is compelled by application of the "basic principles of Title VII law" and the

---

46/ Following enactment of the PDA, the EEOC amended its Guidelines on Discrimination Because of Sex, adopting the position as to spousal benefits which it had expressed to the Senate Human Resources Committee prior to passage. 29 C.F.R. §1604.10 (Questions and Answers 21 and 22). See note 44, supra. Since Congress passed the PDA knowing that this was the EEOC's position, the EEOC's guidelines on this point are entitled to especially great deference. Moreover, they are consistent and contemporaneous statutory interpretations which suffer from none of the other infirmities that led this Court in Gilbert to disregard the relevant aspects of the guidelines discussed therein. Cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 142-43 n.4 (1977) (Court deferred to portion of EEOC guideline regarding job seniority policies).

clarified definition of sex discrimination provided by the PDA. We will first examine those "basic principles," and then apply them to the facts of this case.

A. "Basic Principles of Title VII Law" Govern Claims by Men, Claims of Discrimination in Fringe Benefits, and Claims Involving Spousal Benefits.

Of the range of "basic principles of Title VII law" that apply to cases brought under that statute, three are particularly relevant to resolution of the issue in this case. The first is that men may be the victims of sex discrimination, and have a cause of action for the harm that it causes them. This is the principle of even-handed nondiscrimination that has been discussed previously.[47/] The second relevant principle is that fringe benefits, including insurance plans of various types, are covered

---

47/ Supra, at 21-25.

by §703(a) of Title VII. City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978).

The third basic principle is the logical extension of the first two: because employees necessarily have spouses of the opposite sex, provision of different spousal benefits to male and female employees constitutes disparate treatment as to the employees themselves based on their sex.[48/] In other words, under Title VII, sex-based differences in treatment of employees' spouses constitute sex-based differences in treatment of the employees themselves. Moreover, this principle is well-established in a series of Constitutional sex discrimination cases

---

48/ Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981) (health insurance for spouses provided disparately according to the sex of the employee); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.9(d)(1973).

premised on equal protection grounds.[49/] Thus, for example, it was held to have been unconstitutional for Congress to have provided in the Social Security Act for survivor benefits for widows, but not for widowers, because the different treatment unjustifiably discriminated against female workers required to pay Social Security taxes by affording them less protection for their survivors than was provided to male workers for their survivors. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).[50/]

49/ Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

50/ Similarly, in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), the Court invalidated under the Equal Protection Clause a state statute that provided death benefits to a deceased male worker's widow automatically, but to a deceased female worker's widower only upon a showing of his incapacity or dependency. The court explained that the provision discriminated against women workers because "[t]he benefits...that the [deceased] working woman can expect to be paid to her spouse...are less than those payable to the spouse of the deceased male wage earner." 446 U.S. at 147. To determine whether there was unlawful discrimination, the Court compared female and male wage earners.

Indeed, Senator Bayh referred to this line of cases in his remarks on the Senate floor regarding the application of the PDA to spousal benefits plans, observing that "the history of sex discrimination cases under the 14th Amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents" would require companies that provide comprehensive coverage for female employees' spouses also to provide comprehensive coverage for male employees' spouses.51/

Petitioner does not dispute the validity of any of these basic principles. However, petitioner does not reach the

---

51/ 123 Cong. Rec. S15037 (daily ed. Sept. 16, 1977). Senator Bayh was a co-sponsor of S. 995. Moreover, as a leading proponent of women's rights, chief sponsor of the Equal Rights Amendment, and the sponsor and floor manager in the Senate of Title IX of the Education Amendments of 1972, Senator Bayh had substantial expertise in sex discrimination law. His analysis of what would constitute sex discrimination if the PDA were enacted thus may not be easily disregarded.

application of these principles to this case, contending instead that this case is governed by Gilbert. For the reasons previously discussed, Gilbert is no longer valid, and these basic principles must be applied to petitioner's Plan in light of the PDA's clarification of the definition of sex discrimination.

B. Application of Title VII as Amended by the PDA Invalidates Petitioner's Medical Benefits Plan.

Petitioner's Plan limits the hospitalization benefits provided to male employees for their spouses; there is no such limitation upon the benefits provided to female employees for their spouses. Application of the relevant principles of law to this Plan yields the conclusion reached by the Fourth Circuit -- that petitioner's Plan unlawfully discriminates against its male employees. First, this case involves a claim of discriminatory treatment of male employees and is therefore cognizable under Title VII.

Second, this discriminatory treatment involves a differential in fringe benefits -- here, hospitalization coverage -- provided to the male and female employees. Third, that differential stems from the differential in hospitalization coverage provided to employees for their spouses, and thus constitutes different treatment of the employees themselves. Finally, that difference in the employees' spousal benefits is based upon pregnancy, which, as a matter of law, is a prohibited sex-based classification under Title VII as amended by the PDA. In other words, because the disparate treatment of the employees' spouses is based on pregnancy, it is sex-based; since sex-based disparate treatment of employees' spouses constitutes sex-based disparate treatment of the employees themselves, petitioner's limitation upon the pregnancy-related benefits in its employees' spousal coverage constitutes unlawful sex discrimination against its male employees.

CONCLUSION

For all the above reasons, this Court should affirm the judgment of the court below.

March 1, 1983

Respectfully submitted,

JUDITH E. SCHAEFFER
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

JUDITH L. LICHTMAN
(Counsel of Record)
DONNA R. LENHOFF
Women's Legal Defense Fund
2000 P Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-0364

Attorneys for Amici Curiae*/

*/ Amici express their appreciation to Yoanne Barnett, Clare Harrigan, and Susan Barlocher for their assistance in the preparation of this Brief.

Office-Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE UNITED STEELWORKERS OF AMERICA, THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

BERNARD KLEIMAN
CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT FRIEDMAN
CAROLE W. WILSON
1126 16th Street, N.W.
Washington, D.C. 20005

WINN NEWMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. In Enacting The Pregnancy Discrimination Act, Congress Intended To Clarify For All Title VII Purposes That Discrimination Based On Pregnancy Is Discrimination Based On Sex	5
A. Gilbert and Related Cases	6
B. Congress' Reaction to Gilbert	8
C. Implications for This Case	12
II. To Discriminate Between Employees' Spouses In Benefit Programs On The Basis Of Sex Is Necessarily To Discriminate On That Basis Between The Employees Themselves	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Califano v. Goldfarb, 430 U.S. 199 ..... 4, 19, 20, 21, 22
Craig v. Boren, 429 U.S. 190 20
Frontiero v. Richardson, 411 U.S. 677 ..... 5, 6, 19, 20, 21, 22
Geduldig v. Aiello, 417 U.S. 494 ..... 6, 7, 8
General Electric Co. v. Gilbert, 429 U.S. 125 ..... 2, 7, 8
Kahn v. Shevin, 416 U.S. 351 4
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 ..... 3, 15
Mississippi University of Women v. Hogan, —— U.S. ——, 50 L.W. 5068 4
Phillips v. Martin Marietta Corp., 400 U.S. 542 2
Schlesinger v. Ballard, 419 U.S. 498 4
Steelworkers v. Weber, 443 U.S. 193 3
United States v. Turkette, 452 U.S. 576 13
Weinberger v. Wiesenfeld, 420 U.S. 636 ..... 4, 19, 20, 21, 22
Wengler v. Druggists Mutual Insurance Co., 466 U.S. 142 ..... 19, 22

Statutes:

Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e)(k) ..... *passim*
Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000, et seq. ..... *passim*
§ 701 13
§ 703(a)(1) 14
§ 703(e) 20
§ 703(h) 15
Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §§ 1961 & 1962 13

Miscellaneous:

H. Rep. No. 95-948, 95th Cong., 2d Sess. 10
S. Rep. No. 95-331, 95th Cong., 1st Sess. 9, 15, 16
United States Senate Committee on Labor and Human Resources, Legislative History of the Pregnancy Discrimination Act of 1978, 96th Cong., 2d Sess. 5, 9, 10, 11, 12, 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE UNITED STEELWORKERS OF AMERICA, THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations, a federation of 99 national and international unions, the United Steelworkers of America, AFL-CIO, the union that represents the Petitioner's employees, the International Union of Electrical, Radio and Machine Workers, the union litigating in *EEOC et al* v. *Emerson Electric Co.*, (C.A. 8 No. 82-1647-EM), the same issue as is presented in this case, and the Coalition of Labor Union Women (CLUW), an organization of approximately 12,000 individuals concerned with discrimination against women, particularly in the area of employment, file this brief *amici curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first case to come before this Court concerning the application of the Pregnancy Discrimination Act ("PDA") of 1978, 42 U.S.C. § 2000e(k), the amendment to Title VII of the Civil Rights Act of 1964 passed in reaction to this Court's opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125. Petitioner's central submission is that in passing the PDA, Congress inserted into Title VII a definitional gloss on the meaning of discrimination "because of . . . sex" which applies when female employees are adversely affected by a differential treatment based on pregnancy, but not when male employees are so affected. According to Petitioner, Congress had no quarrel with the "rationale" as opposed to the "holding" of *Gilbert*. Brief for Petitioner ("Pet. Br."), at (i). Rather, says Petitioner, "precisely what Congress did" in passing the PDA was to "mandate[] special, preferential treatment contrary to the principles of [Title VII] law" (Pet. Br. at 30), by giving different content to the prohibition on sex discrimination depending upon whether male or female employees are injured. *See, e.g.*, Pet. Br., at 9-10 (Properly construed, the PDA changed the law of Title VII only with respect to female employees and female applicants for employment."); *id.*, at 30-31 ("Congress [in the PDA] enacted legislation exclusively for the benefit of the female worker.").

That such a preference is squarely contrary to the basic presuppositions of Title VII can scarcely be doubted. From the outset, Title VII has been understood to "require[] that persons of like qualifications be given employment opportunities irrespective of their sex." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544. This principle has not been limited to situations in which all women, or all men, are disadvantaged; in *Phillips*, for example, the policy differentiated between women with pre-school age children *and all other employees*, including

women without preschool age children.[1] Rather, the touchstone has been whether the practice in question comprises "treatment of a person in a manner which but for that person's sex would be different." *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711. And, that principle is as applicable in the area of employment-related insurance and fringe benefits as in any other context. *Manhart*, *supra*, *id.* at 710.

To define discrimination "because of . . . sex" one way where a female employee's benefits are concerned and the opposite way where a male employee's benefits are concerned is surely to treat the man "in a manner which but for that person's sex would be different." *Manhart*, *supra*, *id.*, at 711. Consequently, while it is of course possible that Congress legislated in the manner Petitioner suggests,[2] this Court should demand overwhelming proof

---

[1] Arguably, this Court has in one circumstance, involving race discrimination and not sex discrimnation, sanctioned a departure from this basic rule. *Steelworkers* v. *Weber*, 443 U.S. 193. In that case, "the legislative history of Title VII and the historical context from which the Act arose" convinced the Court that "an interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute.'" *Id.*, at 201-202. The *Weber* court therefore concluded that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." *Id.*, at 207.

Petitioner's position in this case is quite different: the claim here is that Congress *did* "limit traditional business freedom" with regard to differentiations based on pregnancy, but did so only where female, and not male, employees are concerned. For this reason, as well as because the historical and contextual factors which were persuasive in *Weber* are not here present (see *infra*, pp. 5-12), *Weber* lends no support to Petitioner's argument that the PDA transformed Title VII into a statute that sanctions preferential treatment for women employees.

[2] If this Court were to determine that Congress did intend in the PDA to prefer women employees by applying to them alone a more favorable concept of unlawful gender-based differentation, it would then have to face the question whether the Act as thus

that Congress so intended before concluding that Congress worked such a seachange in the nature of Title VII's protections.

As we show in Part I of our Argument, *infra*, the history and wording of the PDA do not support the conclusion that Congress intended in the PDA to transform Title VII by incorporating into that statute a differentiation based upon sex. Rather, Congress made quite plain the legislature's fundamental disagreement with this Court's *analysis* in *Gilbert* (and not simply the result), and its intent to substitute for all Title VII purposes a conception of sex discrimination different from that stated in *Gilbert*. Further, members of Congress, in discussing the PDA, expressly and repeatedly rejected the view that Congress was legislating a preference for women workers. Instead, the PDA was understood as restoring in full the Title VII principle of equality of treatment the legislature believed had been disturbed in *Gilbert*.

Congress declared that where pregnancy differentiation in benefits is at stake, the same concept of sex discrimination would apply to male employees and to female employees. And Congress recognized that once that uniform definition is applied, the question whether a pregnancy distinction in medical coverage between the *spouses* of male employees and of female *employees* is to be considered discrimination between *employees* on the basis of sex could not be answered under the PDA alone. That question was seen to be one concerning the scope of Title VII coverage of dependents' fringe benefits generally, to be resolved by the courts on the basis of general Title VII principles. Since Congress expressly declined to resolve that question, it is futile to search the PDA deliberations

---

amended is constitutional. *Compare, Mississippi University for Women* v. *Hogan*, —— U.S. ——, 50 L.W. 5068 (July 1, 1982); *Califano* v. *Goldfarb*, 430 U.S. 199; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, *with Schlesinger* v. *Ballard*, 419 U.S. 498; *Kahn* v. *Shevin*, 416 U.S. 351.

for any conclusive legislative intent upon the legality of exclusion or limitation of pregnancy-related medical coverage for employees' spouses.

In Part II of our Argument, *infra*, we explore the question Congress thus left open for judicial resolution. As we show, while there is little Title VII law on the question whether differentiation on the basis of gender between spouses of employees constitutes discrimination against employees based on sex, there is a well-developed line of cases in this Court on similar questions arising under the Fourteenth Amendment's equal protection clause. Under these cases, beginning with *Frontiero* v. *Richardson*, 411 U.S. 677, it is clear that gender-based distinctions in the benefits offered employees' spouses constitutes sex discrimination between the employees themselves. Since Title VII incorporates a prohibition upon gender-based distinctions if anything *more* strict than that imposed by the equal protection clause, the employment policy at issue in this case must be held to violate Title VII.

ARGUMENT

I. In Enacting the Pregnancy Discrimination Act, Congress Intended to Clarify for All Title VII Purposes That Discrimination Based on Pregnancy Is Discrimination Based on Sex.

The avowed purpose of the PDA as introduced in Congress on March 15, 1977, could not have been more clearly stated: "to counteract the Supreme Court's decision in General Electric versus Gilbert." United States Senate Committee on Labor and Human Resources, *Legislative History of the Pregnancy Discrimination Act of 1978*, 96th Cong., 2d Sess., ("Leg. Hist."), at 8 (remarks of Sen. Mathias). *See also, e.g., id.*, at 11 (remarks of Rep. Hawkins). The best starting point in understanding the intended reach of the PDA, then, is the pre-PDA opinions of this Court concerning the exclusion of pregnancy-related risks from benefit programs.

A. *Gilbert and Related Cases.* The first such decision was *Geduldig* v. *Aiello*, 417 U.S. 484. *Geduldig* did not concern the interpretation of Title VII, but, like this case, did involve a benefit program singling out normal pregnancies for lesser coverage. The three dissenting Justices' view of the situation presented there puts that case in perspective for present purposes:

> "By singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination. [417 U.S., at 501].

The *Geduldig* dissenters, relying on *Frontiero* v. *Richardson*, 411 U.S. 677, would, on the basis of the reasoning just quoted, have applied the heightened standard of judicial scrutiny applicable in constitutional cases concerning sex discrimination to the exclusion of pregnancy from a disability compensation program and have found the exclusion invalid. The *Geduldig* majority rejected that approach in terms:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classi-

> fication like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. [417 U.S., at 496 n.20]

Thus, *Geduldig* did not narrowly focus on the question whether exclusion of an *employee's* own pregnancy from a benefit program constitutes a gender-based classification of employees. Rather, since the plaintiffs' claim was based on the Constitution, the employment context of the differentiation was immaterial. The central conceptual question was, instead, whether exclusion of a gender-linked trait from an otherwise inclusive benefits program constitutes discrimination based on sex.

The question whether exclusion of a pregnancy-related risk from an otherwise comprehensive benefit program is a gender-based differentiation recurred, this time in a Title VII context, in *General Electric Co.* v. *Gilbert*, *supra*. The *Gilbert* majority relied heavily upon *Geduldig*:

> Section 703(a)(1) provides in relevant part that it shall be an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1).
>
> While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII. We think, therefore, that our decision in *Geduldig* v.

> *Aiello, supra*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex . . . . *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that *the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex.* [429 U.S., at 133, 135 (emphasis added).]

On the central, and ultimately determinative, question whether "an exclusion of pregnancy from a disability-benefits plan providing general coverage is . . . gender-based discrimination at all," then, the *Gilbert* majority found *Geduldig* "precisely in point." 429 U.S., at 136.

The two dissents filed in *Gilbert* both rejected the majority's conclusion that exclusion of pregnancy-related risks from a benefits program has nothing to do with sex discrimination. In an opinion for himself and Justice Marshall, Justice Brennan maintained that "it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" *Id.*, at 149 (Brennan, J., dissenting). And Justice Stevens believed that because "it is the capacity to become pregnant which primarily differentiates the female from the male . . . the rule at issue . . . [b]y definition . . . discriminates on account of sex." *Id.*, at 161-162 (Stevens, J., dissenting).

The salient point for present purposes is that, for *both* the majority and the dissenters in *Gilbert*, the central issue remained the conceptual one concerning the characterization of a pregnancy exclusion from a benefits program earlier addressed in *Geduldig*.

B. *Congress' Reaction to Gilbert.* To the members of Congress who introduced and supported the PDA, the conceptual analysis of the majority in *Geduldig* and in *Gilbert* was incorrect and was, moreover, inconsistent with the basic statutory scheme of mandating equality of treat-

ment regardless of an employee's sex. This view was reiterated over and over again on the floor of Congress, and in the Committee Reports. For example, in introducing the bill, Senator Williams proclaimed:

> Mr. President, when an employer's plan provides protection in the event of virtually every conceivable disability but one, and that one can affect only women, it is an inescapable conclusion that such a plan by definition discriminates on the basis of sex. . . . Such a scheme of risk allocation is obviously discriminatory and not "gender neutral". . . . In so concluding, the Court has ignored the congressional intent in enacting Title VII of the Civil Rights Act . . . *to protect all workers from unjust employment discrimination.* . . . There cannot be a place for unequal treatment of men and women in a country that takes pride in its heritage of freedom and democracy. [Leg. Hist., at 2-4 (Mar. 15, 1977) (remarks of Sen. Williams) (emphasis added).]

Similarly, Rep. Hawkins, the principal sponsor of the PDA in the House of Representatives, believed that,

> [I]t seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy. . . [The] view . . . that a classification which harms only women and does so on the basis of a factor inextricably linked to gender is not discrimination against women just because not all women are affected . . . is contrary to any sensible approach . . . as Mr. Justice Stevens noted in his dissent in *Gilbert.* [Leg. Hist. at 23-24 (April 5, 1977) remarks of Rep. Hawkins).]

The Senate and the House Committee as well state the view that "the passages [quoted *supra*, p. 8] from the two [*Gilbert*] dissenting opinions correctly express both the principle and the meaning of Title VII." S. Rep. No. 95-331, 95th Cong., 1st Sess., at 2; *see also* H. Rep. No.

95-948, 95th Cong., 2d Sess., at 2 ("It is the committee's view that the dissenting Justices correctly interpreted the Act").

The amendment Congress devised to "counteract . . . *Gilbert*" follows naturally from the analytic error of that decision as the legislature perceived that error: Congress determined "to change the *definition* of sex discrimination in Title VII to reflect the 'commonsense' view and . . . to make plain that, under Title VII . . . discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex." S. Rep. No. 95-331, *supra*, at 3 (emphasis supplied). The express purpose of this definitional change is to "prohibit discrimination on the basis of pregnancy or conditions arising out of pregnancy for *all* employment-related purposes." (Leg. Hist., at 62) (Sept. 8, 1977) (remarks of Sen. Williams) (emphasis supplied).[3]

This explicit and complete congressional rejection of *Gilbert's* theoretical premises hardly comports with an intention to create a preference for female employees, and to otherwise accept that decision's analysis where male employees are concerned. Indeed, in enacting the PDA, Congress made clear its intent to perfect the general equality principle of Title VII. Congress was *not*, as Petitioner maintains, enacting special, preferential treatment for women employees.

Thus, from the outset of the congressional deliberations *Gilbert* was described as not only "a serious setback to women's rights" but *also* as a setback "to the development of antidiscrimination law under Title VII," (Leg. Hist.,

---

[3] See also *id.*, at 3 (Mar. 15, 1977) (remarks of Sen. Williams); *id.* at 8 (Mar. 15, 1977) (remarks of Sen. Mathias); *id.* at 24 (April 15, 1977) (remarks of Rep. Hawkins); *id.*, at 74-75 (Sept. 16, 1977) (remarks of Sen. Bayh); *id.*, at 106 (Sept. 16, 1977) (remarks of Sen. Williams); *id.*, at 110 (Sept. 15, 1977) (remarks of Sen. Javits); *id.* at 166 (July 18, 1978) (remarks of Rep. Hawkins).

at 1 (Mar. 15, 1977) (remarks of Sen. Williams)), and as consistent with the "intent of Congress in enacting Title VII — . . . to protect *all individuals* from unjust employment discrimination . . . including pregnant women," (Leg. Hist., at 6 (September 8, 1977) (remarks of Sen. Williams) (emphasis supplied)). Members of Congress repeatedly stressed that "the touchstone of compliance with S. 955 is equality of treatment, and any policy which affects pregnancy, childbirth, or related conditions must apply equally to other types of disabling conditions as well . . . [T]his bill demands equal treatment and nothing more." Leg. Hist., at 83 (Sept. 16, 1977) (remarks of Sen. Stafford).[4] Consistent with this view, the bill's prime sponsors explicitly *rejected* the contentions made during deliberations on the bill (and now made once again by Petitioner in this case) that "we are doing pregnant women some kind of favor," maintaining instead that "what we are dealing with here . . . is . . . a discrimination which we should not accept." Leg. Hist., at 110 (Sept. 16, 1977) (remarks by Sen. Javits).

The treatment of one proposed amendment exemplifies the commitment of the PDA's sponsors to the equality principle that is the basis both of Title VII and of that Act: Senator Hatch proposed an amendment to the bill that would have limited the number of weeks of disability benefits available to pregnant women workers. Leg. Hist., at 96 (Sept. 16, 1977). He supported his proposal by characterizing the bill as "a bonus or benefit for pregnancy" (*id.*, at 97), and suggesting that "pregnancy dis-

---

[4] *See also id.*, at 67 (Sept. 8, 1977) (remarks of Sen. Javits); *id.*, at 133 (Sept. 16, 1977) (remarks of Sen. Culver) (goal is "equal treatment without regard to sex for all workers,"); *id.*, at 170 (July 18, 1978) (remarks of Rep. Sarasin) ("This bill restores equity to the treatment of fringe benefits in employment under Title VII"); *id.*, at 184 (July 18, 1978) (remarks of Rep. Whalen) ("Title VII should protect all workers, pregnant or otherwise, from sex discrimination.")

ability coverage can be reasonably provided if we mandate that it be required for no more than 6 weeks in the normal pregnancy situations" (*id.*, at 100). Senator Williams spoke against the amendment:

> The hallmark of Title VII, and of this legislation, is that it would require that *all* American workers be treated fairly by their employers, without regard to their sex, except insofar as it would affect their ability or inability to work . . . . [W]e cannot, if we are passing a bill that deals with discrimination, create new discrimination. . . . [i]t would finally end up across the street in the Supreme Court, because we would be writing discrimination in a law that is designed to end discrimination. . . . . We are here to deal with that specific pregnancy disability, and we cannot, in dealing with that discrimination, create our own here on the floor. [Leg. Hist., at 103-104 (Sept. 16, 1978) (remarks of Sen. Williams) (emphasis supplied).]

Senator Javits echoed these remarks in arguing for rejection of the Hatch amendment:

> I think we are faced with a situation where we are asked to install discrimination in a bill which seeks to eliminate discrimination . . . [T]he basis for our bill and *the reason why it is in the civil rights statute* is that it is a negative thing. We do not want pregnancy *discrimination against . . .*" We are making it crystal clear . . . that this is what the Civil Rights Act includes. [Leg. Hist., at 106 (Sept. 16, 1977) (remarks with Sen. Javits) (emphasis supplied).]

The Hatch amendment was thereupon defeated, 72-13. Leg. Hist. at 124.

C. *Implications for this Case.* It is true, as Petitioner stresses (Pet. Br., at 13-19), that Congress' concern with the plight of working women was in large part the motivation for enacting the PDA; it is also true that Congress made an express and considered decision to ac-

complish its goal through an amendment in strict keeping with the overall equality principles of Title VII.

Both these points being true, Petitioner's statutory construction argument in this case is similar to that rejected in *United States* v. *Turkette*, 452 U.S. 576. In that case, the defendant argued that because, as the Court agreed, "the legislative history forcefully supports the view that the major purpose of [the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 & 1962] is to address the infiltration of legitimate business by organized crime [; a] point . . . made time and again during the debates and in the hearings before the House and the Senate" (*id.* at 591), the Court should infer that the Act "did not reach the activities of enterprises organized and existing for criminal purposes" (*id.*).

Just as the Court in *Turkette* rejected the "negative inference" (*id.*) argued for there as inconsistent with the overall structure of RICO, so should the Court reject, as inconsistent with Congress' considered decisions embodied in the PDA, the inference that because the major purpose of the bill is to protect women employees the PDA applies only when women employees are adversely affected. Particularly, when read in light of the legislative history summarized above, the language and structure of the amendment does not create the "negative inference" that the PDA does not alter the Title VII definition of sex discrimination where male employees are concerned.

As already noted, the PDA amendment to Title VII appears in § 701 of that Act which is headed "Definitions," certainly an unlikely location for a provision which, according to Petitioner, works a fundamental change in Title VII's equality principles. And, the first part of the amendment is in the form of a definition, general and unlimited: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the

basis of pregnancy, childbirth, or related medical conditions; . . . ."[5]

The second portion of the PDA—"and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."—even if read as limited to "women employees", although its words are not so limited, in no way detracts from the generality and breadth of the definition portion.[6] Rather, the obvi-

---

[5] Petitioner suggests that by inserting the PDA definitional phrase into the operational section here at issue, § 703(a)(1), 42 U.S.C. § 2000e(2)(a)(1), it is possible to demonstrate that the PDA applies only to an employee's *own* pregnancy. Pet. Br., at 11. The problem, however, is that the words defined in the PDA, "because of sex", do *not* appear in that precise sequential order in § 703(a)(1). Rather, that section makes it unlawful "to discriminate against any individual in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, religion, sex and national origin." If literalism were the touchstone, it would be considerably more literal to insert the PDA language into § 703(a)(1) by *leaving out* the intermediate words "such individual's", not used in the PDA, than by leaving in those words. (Indeed, it could be argued with some force that Congress may *intentionally* have left out the two words upon which Petitioner so heavily relies from its definition precisely to indicate that the definition applies *whether or not* the pregnancy in question is that of the individual employee.)

[6] It is worth noting in this regard that § 703(a)(1) protects an employee "with respect to *his* compensation, terms, conditions or privileges of employment." (Emphasis supplied.) If it were appropriate to imply into a statute purporting to protect against sex discrimination a right accorded one sex but not the other, one might read § 703(a)(1), because of the pronoun "his", as affording relief only to men. Obviously, this was not Congress' intent. The inference, from the reference to "work," that the second sentence of the PDA indicates an intention to protect only women employees, is no stronger, particularly since the sentence otherwise refers, in general terms to "women" and to "persons," not to "women employees" and to "other employees."

ous point of the latter is to particularize the former with regard to the situation that generated the PDA—exclusion of pregnancy coverage from employees' disability benefits. The second portion of the PDA, as befits a provision joined to the basic definitional provision with an "and," *adds* to the definition a specific illustration of how the bill is to apply in the common situation on which the legislature had focused.[7]

---

[7] It must be remembered in evaluating the second portion of the PDA that Congress acted *before* this Court decided *Manhart, supra.* Consequently, it was not yet clear that under Title VII itself, a "difference in the cost of providing benefits for . . . classes," such as women, protected by Title VII is no defense to differential treatment of such classes in an employee-benefit plan or other employment-related program. *Id.* at 716. Nor had it been determined whether the Bennett Amendment portion of § 703(h), 42 U.S.C. § 2000e-2(h), insulated employee-benefit plans from sex discrimination charges, as the *Gilbert* opinion may have intimated. See, *Manhart, supra,* 435 U.S. at 713-14. Thus, while in retrospect it may seem that the definitional provision alone would have been sufficient to assure the specific results Congress intended, the Congress, which enacted the bill legislating without knowledge of the future development of Title VII law, chose to state in the second portion of the amendment that whatever that development, pregnancy exclusions were to be treated in a particular manner in two respects. First, that a functional comparability test is to be used in applying the PDA definition thereby negating any notion that as long as the costs of benefit coverage for men and for women or for pregnant people and non-pregnant people are comparable there can be no Title VII violation. And, second, that where the PDA otherwise applies to employee benefit plans, the Bennett Amendment does not negate the change in prior law accomplishd through the PDA. *See,* S. Rep. No. 95-311, *supra,* at 7; H. Rep. No. 95-948, *supra,* at 7.

We note in this regard that Petitioner has not yet absorbed the lesson of *Manhart,* and continues to maintain that fringe benefit plans which facially differentiate on the basis of gender can be valid "if employer contributions are equal for employees of both sexes." Pet. Br., at 37. *Compare,* Brief for the American Federation of Labor and Congress of Industrial Organizations in *Arizona Governing Committee* v. *Norris,* No. 82-52, at 11-30, in support of

Petitioner places great weight on the proposition that the Senate Report is contrary to the legislative history discussed above and to the import of the statutory materials just discussed. To the contrary, the explanation of the PDA we have given thus far tracks that of the Senate Report.

First, that Report both recognizes that "the basic purpose of this bill is to protect women employees," and declares that, nonetheless, the bill "does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII purposes." S. Rep. No. 95-331, *supra, at* 5-6 (emphasis supplied). Thus, the Senate Committee made it quite clear that the definitional change applies "for Title VII purposes," and *not* only where "women employees" are concerned.

Second, the Senate Report goes on briefly to explore the interaction of this definitional change and existing Title VII principles regarding the questions as to dependents' benefits that might arise. The Report rejects any suggestion that the PDA standing alone means that "if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of employees would also have to be covered." *Id.* at 43. But, the Report states too "the question whether an employer who does cover dependents . . . may exclude conditions related to pregnancy from that coverage *is a different matter.*" *Id.* at 6 (emphasis supplied). As to that "different matter," the Committee declined to express a conclusive view, noting that there had been no Title VII litigation in the past because such plans are "rare." *Id.* The Committee did, however, point to the appropriate analytic scheme for answering this question. Once the definitional change

---

the conclusion that *Manhart* precludes a cost-aggregating approach to sex discrimination in fringe benefits.

made by the PDA had been accomplished, "the question would remain whether, under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." *Id.*

* * * *

The upshot is this: The impetus for the PDA was Congress' concern for women employees. Congress proceeded to meet that concern, however, by way of a definitional change applicable for *all* Title VII purposes. Because of this change, the argument is not available to employers, as it would have been under the conceptual framework of *Geduldig* and *Gilbert*, that women dependents denied pregnancy coverage available for other medical conditions are not discriminated against because of their sex. Beyond denying employers that argument Congress declined to go. Whether or not discrimination among employees' dependents because of their sex is sex discrimination among *employees*, implicates, as Congress realized, more general Title VII principles and is therefore a question that was best left to the litigation process for final determination.

In the face of Congress' considered decision to outline a conceptual framework for considering cases such as this and not to venture further, a painstaking inquiry into congressional intent upon the specific question in this case is, it appears to us, futile. For this reason, we do not inquire into the statements made on the floor of the Senate [8] expressing individual Senators' views as to the appropriate judicial answer to the question at the intersection of the PDA and Title VII affecting dependents' benefits.[9] Rather, we proceed directly to the issue posed

---

[8] The dependents' benefits issue apparently did not come up in the House of Representatives.

[9] In particular, we see no more, and probably less, significance in this regard in the floor statements of Senator Williams (Leg. Hist. at 80) as compared to those of Senators Bayh and Cranston (Leg.

by the Senate Report—*viz.*, whether male employees who receive coverage which on the basis of gender differentiates their spouses from the spouses of women employees are the victims of discrimination based on sex for Title VII purposes.

II. To Discriminate Between Employees' Spouses in Benefit Programs on the Basis of Sex is Necessarily To Discriminate On that Basis Between the Employees Themselves.

Once it is determined that the PDA definitional change applies in all Title VII cases, and not only where women employees are adversely affected, the question in this case comes down to this: Does it violate Title VII to provide male employees with a benefit program that differentiates

---

Hist. at 75, 131). *See* Pet. Br. at 25-28. Senators Bayh and Cranston, who made statements supporting our view on the proper outcome of a case such as this, expressly recognized that, as the Committee Report had stated, the question was one to be decided by the courts, in light of the PDA, and not under the PDA alone; that is why Senator Bayh declined "to second-guess the courts" (Leg. Hist. at 73), and Senator Cranston expressed only "my own view" (Leg. List. at 131).

Senator Williams was, of course, the Chairman of the Senate Committee which had produced the Report discussed in the text. As such, he would surely not put himself in the position of compromising on the floor of the Senate the considered decision of the committee as a whole. It was for this reason, presumably, that, in the colloquy with Senator Hatch relied upon by Petitioner, Senator Williams was careful to limit his remarks to "income maintenance" programs (Leg. Hist. at 80) and to a demonstration that the "women affected by pregnancy" sentence does not so alter Title VII as to obviate the need to show discrimination based on the sex *of the employee*. Thus, Senator Williams' remarks on the floor of the Senate are best read as not reaching the question left open in the Committee Report. At any rate, even if read more broadly, Senator Williams' remarks are, in light of the Committee Report, simply his "own views," and no more authoritative "second-guess[ing] [of] the courts" than those of Senators Cranston and Bayh.

their spouses from the spouses of women employees on the basis of sex?

The Title VII law on this generic question is, outside the present pregnancy context, relatively sparse.[10] There is, however, a line of directly relevant cases decided under the Constitutional Equal Protection guarantees. *Frontiero* v. *Richardson*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Califano* v. *Goldfarb*, *supra*; *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142.

Frontiero concerned "the right of a female member of the uniformed services to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and *medical and dental benefits* [when] . . . a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him. . . ." 411 U.S., at 678 (emphasis supplied). The Court held, 8-1, that "by according differential treatment to male and female members of the uniformed services . . . the challenged statutes violate the [equal protection guarantee of] the Due Process Clause of the Fifth Amendment. . . ." *Id.*, at 690-691. While there was substantial disagreement on the question of the standard to be applied under the Constitution in reviewing legislative distinctions based on gender, no member of the majority doubted that the differentiation in question *was* based on the gender *of the serviceman*—the employee whose benefits were in question. *Id.*, at 690; *id.*, at 691 (Steward, J., concurring); *id.*, at 691 (Powell, J., concurring). That the class of persons not paid dependents' benefits included both men and women (because many men had no dependents) was not considered relevant.

---

[10] Commission Decision No. 70-513, 2 FEP Cases 515 (1970); Commission Decision No. 70-660, 2 FEP Cases 590 (1970); Commission Decision No. 70-660, 2 FEP Cases 590 (1970); Commission Decision No. 70-510, 2 FEP Cases 587 (1970); Commission Decision No. 71-1100, 3 FEP Cases 272 (1970).

For present purposes, the only pertinent distinction between *Frontiero* and this case is that here the gender differentiation is, in terms, between spouses, not between employees.[11] But, surely, *Frontiero* would have been decided the same way, and according to the same analysis, if the rule under attack had limited medical benefits for male spouses of employees rather than for spouses of female employees. Because only women have male spouses, such a scheme is simply another way of stating the limitation upon spousal benefits for women employees.

The Court next addressed gender-based differentiation in spousal benefits in two Social Security Act cases, *Weinberger* v. *Wiesenfeld*, *supra*, and *Califano* v. *Goldfarb*, *supra*. These cases both concerned Social Security Act sections providing benefits for surviving widows, but not necessarily for surviving widowers, of covered employees. In these cases, unlike *Frontiero*, the differentiation was in terms based on the gender of spouses, and not upon

---

[11] As we established in Part I, *supra*, limitation of spousal pregnancy benefits from a medical benefits program is, for Title VII purposes, considered discrimination on the basis of the spouse's sex. Thus, the pregnancy aspect of this case is not pertinent at this juncture in the analysis; rather, this case must be seen as conceptually identical to one in which an employer has a less favorable plan for female spouses than for male spouses—for example, one providing a fifty dollar deductible for husbands and a hundred dollar deductible for wives.

Nor is the constitutional context of *Frontiero* and its progeny a pertinent line of distinction between this case and those. The standard of review applied in constitutional sex discrimination cases is *less* stringent than that applicable for race (*Craig* v. *Boren*, 429 U.S. 190), while the statutory protection accorded race and sex under Title VII is identical except for two circumscribed statutory limitations on the sex discrimination prohibition (the Bennett Amendment and the bona fide occupational qualification ("bfoq") provision, § 703(e), 42 U.S.C. § 2000e-2(e)). Consequently, unless one of those statutory exceptions is applicable (which no one has claimed to be the case here), sex-based discrimination among employees invalid under the constitution is unlawful under Title VII as well.

that of the employees themselves. Also, the cases concerned social security benefits, which are, unlike fringe benefits flowing directly from an employer, " 'noncontractual' " in nature. *Wiesenfeld, supra*, 420 U.S., at 646; *Goldfarb, supra*, 430 U.S., at 211.

In *Wiesenfeld*, seven of the eight participating members of the Court nonetheless saw the gender-based distinction at issue as one which "without sufficient justification differentiate[d] *among covered employees* solely on the basis of sex." 420 U.S., at 648. *See also, id.*, at 654-655 ("[t]he statutory scheme . . . impermissibly discriminates against a female wage earner") (Powell, J., concurring).[12]

The *Goldfarb* decision, however, saw the Court more divided on this question: The plurality in *Goldfarb*, maintaining that "*Wiesenfeld* is 'dispositive here'," held the section at issue "[p]lainly . . . disadvantages women contributors to the social security system as compared to similarly situated men" because it "provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." 430 U.S., at 208. The concurring and dissenting members of the Court in *Goldfarb*, however, were of the view that because the covered employee "had no contractual right to receive benefits or to control their payment," nothing more than a "uniform tax obligation" was at stake as far as the covered employees were concerned. *Id.*, at 217-218 (Stevens, J., dissenting); *see also id.*, at 230, 240, 241 (Rehnquist, J., dissenting). But both the concurring and dissenting Justices saw this, and not the fact that the gender differentiation was in terms among spouses rather than employees, as the critical distinction between *Goldfarb* and *Frontiero*:

---

[12] Justice Rehnquist saw "no necessity for reaching the issue whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero* v. *Richardson*. . . ." *Wiesenfeld*, 420 U.S., at 655.

> This case is . . . distinguishable from *Frontiero* v. *Richardson* . . . in the sense that social insurance differs from compensation for work done. While there is no basis for assessing the propriety of a given allocation of funds within a social insurance program apart from an identifiable legislative purpose, a compensatory scheme may be evaluated under the principle of equal pay for equal work. . . ." [430 U.S., at 241. (Rehnquist, J., dissenting); *see also id.*, at 217 n.1 (Stevens, J., concurring).]

The final case concerning spousal benefits is *Wengler* v. *Druggists Mutual Insurance Co.*, which involved death benefits under a workers' compensation program. The statute provided for automatic payment of death benefits to wives, but not husbands, of covered employees. This time, seven members of the Court relying on the plurality opinion in *Goldfarb* and the majority opinions in *Frontiero* and *Wiesenfeld*, agreed that there was sex "discrimination against working women", 446 U.S., at 147, and invalidated the gender-based distinction.

At this point, then, there is no doubt that *Frontiero* v. *Richardson* remains good law, and that, since gender-differentiation between spouses covered by a benefits program constitutes, because of the inevitable gender-linkage involved, sex discrimination among the covered employees (as least where the benefit is provided as a contractual right of employment, and not simply as a social insurance program), *Frontiero* could not be decided differently had the gender differentiation been between the spouses rather than the employees. Applying the same principles here, and combining them with the PDA definition, it becomes plain that, because the spouses of male employees are being discriminated against on the basis of sex by Petitioner's medical benefits program, there is necessarily discrimination on the basis of sex against the male employees themselves.

CONCLUSION

Because the denial or limitation of medical coverage for a spouse's pregnancies in an otherwise comprehensive dependent's medical benefits program discriminates against female spouses on the basis of their sex as now defined by Title VII, there was gender-based discrimination between male and female employees with dependents in Petitioner's medical benefits program. For this reason, the judgment below should be affirmed.

Respectfully submitted,

BERNARD KLEIMAN
CARL FRANKEI
Five Gateway Center
Pittsburgh, PA 15222

ROBERT FRIEDMAN
CAROLE W. WILSON
1126 16th Street, N.W.
Washington, D.C. 20005

WINN NEWMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(Counsel of Record)

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

STEPHEN A. BOKAT
Counsel of Record

CYNTHIA WICKER
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. INTEREST OF THE AMICUS	1
II. SUMMARY OF ARGUMENT	3
III. ARGUMENT	4
A. The Language Of The PDA Cannot Justify The Conclusion That It Requires Pregnancy Benefits For Non-Employees	4
B. The Legislative History Buttresses The Statutory Language and Compels The Conclusion That The PDA Did Not Entirely Reverse *Gilbert* v. *General Electric*	6
IV. CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

EEOC v. *Emerson Electric Co.*, 539 F.Supp. 153 (E.D. Mo. 1982), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 6

EEOC v. *Joslyn Manufacturing and Supply Co.*, 524 F.Supp. 1141 (N.D. Ill. 1981), *appeal docketed* No. 82-1634 (7th Cir. April 14, 1982) 6

EEOC v. *Lockheed*, 680 F.2d 1243 (1982), *petition for cert. filed*, 51 U.S.L.W. 2037 (Dec. 15, 1982) (No. 82-1006) 3, 5, 6, 11

Gilbert v. *General Electric*, 429 U.S. 125 (1976) 3

Kansas Association of Commerce and Industry v. *EEOC*, 22 FEP 1343 (D. Kan. 1980) 3

Newport News Shipbuilding and Dry Dock Co. v. *EEOC*, 667 F.2d 448 (4th Cir. 1982) 6, 7, 10

Richards v. *U.S.*, 369 U.S. 1 (1962) 4

Rockbridge v. *Lincoln*, 449 F.2d 567 (9th Cir. 1971) 4

Ruiz v. *Morton*, 462 F.2d 818 (9th Cir. 1972) 4

STATUTES AND REGULATIONS

Pregnancy Discrimination Act (PDA) 42 U.S.C. § 2000e-k ..... *passim*

Guidelines on Sex Discrimination, 29 C.F.R. § 1604.10(b) (1981) 3

MISCELLANEOUS

Pregnancy Discrimination Act Legislative History, Committee Print prepared by the Senate Committee on Labor and Human Resources, 96th Cong., 2nd Session (June 1980) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

INTEREST OF THE AMICUS[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. The Chamber's current membership exceeds 235,000; this includes 231,000 corporations, partnerships, proprietorships and individuals, 1,240 trade associations, and 2,700 local and state chambers of commerce.

As one of its principal functions, the Chamber regularly advocates its members' views before this Court, as

---

[1] Pursuant to Supreme Court Rule 36.2, this brief is filed with the written consent of the parties to this action.

well as the lower federal courts and regulatory agencies.[2] Because of the broad implications of cases decided under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"),[3] the Chamber often expresses its members' views in these cases. *See, e.g., U.S. Postal Service* v. *Aikens*, No. 81-1044, *cert. granted* (March 22, 1982); *EEOC* v. *K-Mart Corp.*, Nos. 81-1722, 81-1909 (6th Cir. Dec. 8, 1982); *Lola Kouba* v. *Allstate*, Nos. 81-4536, 81-4566 (9th Cir. Nov. 16, 1982).

The Chamber has been pressing its views on the issue presented here, whether the EEOC exceeded its statutory authority in mandating that all employees subject to Title VII provide pregnancy benefits for spouses of employees when other spousal benefits are provided, since the adoption of the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Guidelines on Sex Discrimination, 29 C.F.R. § 1604.10(b) (1981). Indeed, the National Chamber Litigation Center, Inc., the Chamber's litigation affiliate, is representing the plaintiff in the first case in federal district court challenging the guidelines at issue here, as well as several others. *Kansas Association of Commerce and Industry* v. *EEOC*, No. 79-4145 (D.Kan. filed August 2, 1979). The Chamber also submitted briefs *amicus curiae* in this matter to the United States Court of Appeals for the Fourth Circuit, both before the panel and the *en banc* court; and the Chamber filed a brief in support of the petition for a *writ of certiorari* to the Fourth Circuit.

The Chamber's interest in this issue is prompted by several factors. The breadth of the coverage of Title VII makes it applicable to an overwhelming majority of the

---

[2] *See, e.g., Bowen* v. *U.S. Postal Service*, No. 81-525, —— U.S. —— (1983), slip op. January 11, 1983; *First National Maintenance Corp.* v. *NLRB*, 449 U.S. 1076 (1981); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1981); *Gould* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979).

[3] Title VII applies to all employers of 15 or more persons.

Chamber's members. Moreover, the cost of complying with the EEOC's guidelines is significant. In *Kansas Association of Commerce and Industry* v. *EEOC*, the Court found that "each corporation subject to Q & A # 21 and 22 will have to pay an additional 3% to 18% higher insurance premiums." 22 FEP Cases 1343, 1347 (D. Kan. 1980); one of its members has informed the Chamber that its cost would exceed $450,000. *See*, Exhibit 1 to the Chamber's brief *amicus curiae* in support of the petition for a *writ of certiorari* in this case. These factors, coupled with the fact that limitations on dependents' pregnancy benefits were common prior to promulgation of the EEOC's guidelines, make it clear that unless the Fourth Circuit is reversed, many employer dollars will be expended on the direct and indirect cost of complying with the EEOC's *ultra vires* guidelines.

It is for all of these reasons that the Chamber files this brief urging this Court to reverse the decision of the court below, and approve the result reached by the U.S. Court of Appeals for the Ninth Circuit in *EEOC* v. *Lockheed*, 680 F.2d 1243 (1982), *petition for cert. filed*, 51 U.S.L.W. 2037 (Dec. 15, 1982) (No. 82-1006).

SUMMARY OF ARGUMENT[4]

The Pregnancy Discrimination Act ("PDA") amended Title VII of the Civil Rights Act of 1964 to incorporate discrimination because of, or on the basis of pregnancy within the definition of sex discrimination. However, the language employed by Congress makes clear that the PDA was intended to protect female *employees*, and not female dependents.

The extensive legislative history of the PDA provides a wealth of support for the statutory language. The PDA did not reverse *Gilbert* v. *General Electric*, 429 U.S. 125 (1976), with respect to non-employees.

---

[4] In the interest of brevity, rather than restating the case, the Chamber incorporates by reference the statement of petitioner Newport News Shipbuilding and Dry Dock Company.

ARGUMENT

A. THE LANGUAGE OF THE PDA CANNOT JUSTIFY THE CONCLUSION THAT IT REQUIRES PREGNANCY BENEFITS FOR NON-EMPLOYEES.

It is axiomatic that interpretation of a statute begins with an examination of its language. It is also incontrovertible that statutory language is to be accorded "such effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant." *Ruiz* v. *Morton*, 462 F.2d 818, 820 (9th Cir. 1972), *quoting Rockbridge* v. *Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971); *Richards* v. *U.S.*, 369 U.S. 1, 11 (1962).

The Chamber submits that the controversy concerning the compass of the PDA, 42 U.S.C. § 2000e-k, can be resolved by using the above approach, which is not only mandated by *stare decisis*, but also simply makes "good sense." The PDA, enacted as an amendment to Title VII, is a part of the definitional section of that Act, 42 U.S.C. § 2000e *et seq.* The PDA states, in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . . .

U.S.C. § 2000e-k.

The first clause of the PDA expressly enlarges the meaning of sex discrimination under section 703(a) of Title VII, 42 U.S.C. § 2000e-2,[5] by adding discrimination

---

[5] Section 703(a)(1) reads as follows: (a) It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

[Continued on page 5]

"because of," or "on the basis of pregnancy, childbirth, or related medical conditions." The second clause illustrates the kind of treatment mandated by Congress, explaining that "women affected by pregnancy, childbirth, or related medical conditions" must be accorded equality for "employment-related purposes" with non-pregnant persons who are "similar in their ability or inability to work." If section one of the PDA is interpreted to give meaning to its two parallel clauses, it must be read to apply to *employees*. As a practical matter, it is illogical to assume that employers could realistically assess a non-employee's "ability or inability to work," or that Congress intended that they do so.

This plain language approach is precisely the one adopted by the United States Court of Appeals for the Ninth Circuit in *EEOC* v. *Lockheed Missiles and Space Co., Inc., supra*. That court stated:

> The first clause is simply definitional: The word "sex" as used in § 703(a) is to be read to mean "pregnancy, childbirth or related medical conditions." Reading PDA against § 703(a)(1) the latter now provides that it shall be an unlawful employment practice for an employer to "discriminate against any individual with respect to his compenastion * * * because of such individual's * * * pregnancy, childbirth or related medical conditions." (Emphasis supplied.) The amendment would have the same effect on § 703(a)(2). This can hardly be read to apply to male employees. By choosing the definitional form of amendment, Congress has expressly limited the scope of its action to women employees.
>
> The second clause in its reference to women employees ("employment-related purposes"; "other persons not so affected but similar in their ability or

---

[5] [Continued]

any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin. (Emphasis added.)

> inability to work") clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent.

680 F.2d at 1244. This is also the approach adopted by the district court in *EEOC* v. *Joslyn Manufacturing and Supply Co.*, 524 F. Supp. 1141, 1142 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) ("The language 'employment-related purposes' and 'similar in their ability or inability to work' has a common sense reading that it pertains to women workers only").

While the court below characterized this construction of the PDA as "tortured," the Chamber submits that it is the better view, and urges this Court to approve the result reached by the Ninth Circuit.

B. THE LEGISLATIVE HISTORY BUTTRESSES THE STATUTORY LANGUAGE AND COMPELS THE CONCLUSION THAT THE PDA DID NOT ENTIRELY REVERSE *GILBERT* v. *GENERAL ELECTRIC*.

Admittedly, the Courts which have addressed this issue, including the Fourth Circuit in its decision below, have found the language of the PDA sufficiently ambiguous to delve into an examination of its legislative history. *E.g.*, *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 667 F.2d 448 (1982); *EEOC* v. *Emerson Electric Co.*, 539 F. Supp. 153, 156 (E.D. Mo. 1982), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982); *EEOC* v. *Josyln Manufacturing and Supply Co.*, *supra*.[6] Upon concluding their review, with the exception of the court below, they have agreed with the Ninth Circuit that the law after enactment of the PDA does not re-

---

[6] While the Ninth Circuit was persuaded by the statutory language, it found "further support for this construction" in the legislative history. *EEOC* v. *Lockheed*, 680 F.2d at 1245.

quire equating pregnancy benefits for female spouses with all other spousal coverage.

With all due respect to the Fourth Circuit, the Chamber submits that it made the same error in examining the legislative history that it made in examining the statutory language itself. It did not give due consideration to *all* of the legislative history.

Overlooking the overwhelming majority of the legislative history the panel, and ultimately the majority of the court *en banc*, relied exclusively upon floor statements by Senators Birch Bayh and Alan Cranston.[7] Both of these Senators made perfectly clear that the views they expressed were personal, and not the collective views of the Senate, or even the committee. *See*, Legislative History at 75 and 130.[8] Indeed, rather than being definitive, Senator Bayh's remarks were quite reflective in tone. *Id.* at 75.

When reviewed in its entirety, the legislative history makes clear that the Fourth Circuit's interpretation was totally at odds with the views of the primary sponsors of the PDA in both the House and the Senate, and the Committees which favorably reported the bill.

Congressman Augustus F. Hawkins, who introduced the PDA in the House, described what in his words was the "narrow approach" of the bill as follows:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify Congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers be treated the same as other employees on the bases of their ability or inability to work.* (Emphasis added.)

---

[7] 667 F.2d at 451.

[8] Committee Print of the legislative history of the Pregnancy Discrimination Act, June 1980, prepared by the Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess.; hereinafter "Leg. Hist."

Leg. Hist at 166. Congressman Hawkins's language, which is almost identical to the language ultimately included in the PDA, invites the inference that it was not coincidental. In this same speech Congressman Hawkins went on to detail examples of disadvantages in the workplace and dire economic consequences which *working women* had suffered because of inadequate or nonexistent pregnancy coverage. Leg. Hist. at 166-168.

Similarly, when Senator Harrison Williams, Chairman of both the subcommittee and committee responsible for the legislation, and a principal sponsor of the legislation, introduced S. 995, which ultimately became the PDA, he stated:

> . . . The Supreme Court's decision . . . in the case of Gilbert against General Electric Co. came as a deep disappointment to *working women* across the nation . . . The 6-3 majority in the Gilbert case concluded that women who must take time off from work because of pregnancy or related disabilities are not entitled by law to the same benefits that their employers provide for workers who have contracted other disabilities. (Emphasis added).

Leg. Hist. at 1.

The Fourth Circuit also completely overlooked what may be the most telling legislative history of all. We refer to an exchange between Senators Williams and Orrin Hatch, wherein they discussed the scope of the PDA:

> Mr. Hatch: The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.
>
> *Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. . . .*

Could the sponsors clarify exactly whom that phrase intends to cover?

. . . . .

Mr. Williams: With regard to more maintenance plans for pregnancy-related disabilities, I do not see how this language could be misunderstood.

Mr. Hatch: Because it is very broadly drafted and if we say "affected by" it, that includes all of those illustrations that I have just enumerated. If it does not, *I want to be sure that everybody knows from the record that it only refers to the woman employee who is pregnant or who becomes pregnant after her employment.*

Mr. Williams: If there is any ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth, is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.

Mr. Hatch: OK; or the effects on other people as a result of the pregnancy of any female employee.

Mr. Williams: Exactly. It does not.

Mr. Hatch: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an

> employee and has become pregnant after her employment?
>
> Mr. Williams: *Exactly.*

Leg. Hist. at 80. (Emphasis added.) [9]

Relying on S. Report 95-331, the Report of the Senate Committee on Labor and Human Resources, the Fourth Circuit concluded that Congress may well have intended to leave the question of dependents' benefits an "open question." 667 F.2d at 451. Despite this concession, the majority of the *en banc* court rejected the contention that the question of dependents' benefits should be resolved upon a consideration of the reach of Title VII prior to enactment of the PDA. But in doing so, the Fourth Circuit overlooked a significant statement in the same committee report:

> . . . it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of Title VII law as regards sex discrimination.
>
> • • • •
>
> Therefore, the question in regard to dependents' benefits would be determined on the basis of *existing* Title VII principles.

Leg. Hist. at 42-43. (Emphasis added.)

The plain and only meaning of "existing" in this context is the case and statutory law in existence prior to the passage of the PDA. As the Ninth Circuit expressed it:

---

[9] These references to the legislative history are only intended to highlight what we believe to be the most significant support for the proposition that the PDA was intended to reverse *Gilbert* v. *General Electric* only in its application to female employees. The record is replete with additional support. *See, e.g.*, Leg. at 7 (Remarks of Senator Brooke); Leg. Hist. at 168 (Congressman Sarasin); Leg. Hist. at 185 (Congressman Tsongas).

> It is thus clear that in enacting PDA, Congress had in mind the fact that a question was presented as to dependents' benefits and deliberately chose not to deal with it. The Senate Report explicitly states that the basic purpose of the legislation was to protect women employees; that Congress did not regard the bill as altering the basic principles of Title VII respecting sexual discrimination and intended that those unaltered basic principles would apply in determining dependents' benefits. In the eyes of Congress then, PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees. (footnote omitted).

Lockheed v. EEOC, supra at 1246.

The Court went on to conclude that:

> under basic principles of Title VII, as they existed prior to PDA, exclusion of pregnancy-related medical expenses of spouses of male employees was not gender-based discrimination in violation of § 703(a) of Title VII. We further conclude that PDA did not change those principles.

Id.

CONCLUSION

The decision of the Fourth Circuit below is irreconcilable with both the language of the PDA and its legislative history. It erroneously supports the EEOC's attempt to administratively "legislate" the provision of pregnancy benefits for spouses. Without belaboring the point, the issue is not whether providing non-employee benefits is a desirable social goal. Rather, the issue is whether Congress authorized the EEOC to effect that goal. It is inconceivable that Congress would have moved to incorporate a new class of protectees in civil rights law without lengthy deliberations and studies. And as more than one proponent of the PDA has stated, "[t]his legislation does not represent a new initiative in employment discrimina-

tion law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas. . . . Rather this bill is simply designed to restore the law with respect to *pregnant women employees* to the point where it was prior to *Gilbert*." (Remarks of Senator Javits, the ranking minority member of the Senate Committee on Labor and Human Resources). Leg. Hist. at 66.

Accordingly, the Chamber urges this court to reverse the decision of the court below.

STEPHEN A. BOKAT
Counsel of Record

CYNTHIA WICKER
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the
Chamber of Commerce
of the United States
of America

Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

October Term, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF EMERSON ELECTRIC COMPANY IN SUPPORT OF PETITIONER NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

FREDERICK T. SHEA
101 Park Avenue
New York, New York 10178
(212) 808-7800

ROBERT H. MCROBERTS, SR.
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

Counsel for Amicus Curiae Emerson Electric Company

Of Counsel:

KELLEY DRYE & WARREN
EUGENE T. D'ARLEMONT
JOHN F. GIBBONS

BRYAN, CAVE, MCPHEETER & MCROBERTS
THOMAS C. WALSH

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. A Limitation On Pregnancy Coverage For Spouses Of Male Employees Is Consistent With The Principles Of Title VII Enunciated In *General Electric Co. v. Gilbert* and The Reasoning Of *Geduldig v. Aiello*	6
II. In Enacting The Pregnancy Discrimination Act Congress Did Not Extend Its Coverage To Spouses Or Other Dependents Of Employees	10
III. The Plain Meaning Of The Pregnancy Discrimination Act Shows That It Covers Employees And Applicants For Employment, Not Dependents Of Employees	12
IV. The Court Owes No Deference To EEOC's Guidelines That Interpret Title VII's Protection Against Pregnancy-Related Discrimination As Extending To Spouses And Other Dependents of Employees. These Guidelines Are Contrary To Law And Of No Force Or Effect	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

	PAGE
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)	20
EEOC v. Emerson Electric Co., 539 F. Supp. 153 (E.D. Mo.), *appeal filed*, No. 82-1647 (8th Cir. May 27, 1982)	2,20
EEOC v. Joslyn Manufacturing and Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal filed*, No. 82-1634 (7th Cir. April 14, 1982)	9,20
EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for reh'g filed*, No. 81-4542 (July 27, 1982)	8,9,11,20
Geduldig v. Aiello, 417 U.S. 484 (1974)	*passim*
General Electric Co. v. Gilbert, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977)	*passim*
Newport News Shipbuilding and Dry Dock Co. v. EEOC, 667 F.2d 448 (4th Cir. 1981), *aff'd en banc*, 682 F.2d 113 (4th Cir. 1982)	12
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, *reh'g denied*, 341 U.S. 956 (1951)	13

Constitution and Statutes:

U.S. Constitution, Amendment XIV	6
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1976)	*passim*
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (Supp. IV 1980)	*passim*

Legislative History:

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)	19,20
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978)	17

PAGE

S. Rep. No. 331, 95th Cong., 1st Sess. (1977) 10,13,17,18,19

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978, Pub. L. 95-555* (Comm. Print 1979) 13

123 Cong. Rec. 7,539-42 (1977) 14,17

123 Cong. Rec. 10,581-83 (1977) 17

123 Cong. Rec. 29,384-89 (1977) 14,17

123 Cong. Rec. 29,640-65 (1977) 16,17

124 Cong. Rec. 21,434-42 (1978) 17

Administrative Materials:

29 C.F.R. Part 1604 (Appendix) (1982) 3,4,19

44 Fed. Reg. 23,804 (April 20, 1979) 4,5,19

No. 82-411

IN THE

Supreme Court of the United States

October Term, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF EMERSON ELECTRIC COMPANY IN SUPPORT OF PETITIONER NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

This brief *amicus curiae* is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2 and the letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

Emerson Electric Company ("Emerson") is engaged in the manufacture and sale of broadly diversified electrical products throughout the world and employs over 47,000 employees in the United States.

Emerson submits this brief as *amicus curiae* in support of Newport News Shipbuilding and Dry Dock Company ("Newport News"), since Emerson, like Newport News, was sued by the Equal Employment Opportunity Commission ("EEOC") for allegedly violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* (1976) ("Title VII"), as amended by the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (Supp. IV 1980) ("PDA"), by failing to provide insurance coverage for the pregnancy-related hospital and medical expenses of spouses of male employees on the same basis that it provides coverage for the nonpregnancy-related hospital and medical expenses of the spouses of its female employees. Emerson's health benefits plans, like the health benefits plan Newport News provides for its employees, place a cap on spousal benefits for pregnancy-related expenses that does not apply to spousal benefits for nonpregnancy-related expenses.

Contrary, however, to the Fourth Circuit's decision in this case, the court in *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo.), *appeal filed*, No. 82-1647 (8th Cir. May 27, 1982), properly found that, in amending Title VII by the PDA, Congress did not intend to regulate employer health benefits plans as applied to any category of employee dependents. EEOC appealed the district court's decision upholding the validity of Emerson's health benefits plans to the United States Court of Appeals for the Eighth Circuit, which is holding the appeal in abeyance pending the Court's decision in this case.

Emerson, therefore, respectfully requests the Court to reject EEOC's interpretations of the PDA and general Title VII principles that seek to force employers nationwide to provide pregnancy-related medical coverage for spouses of male employees to the same extent that they provide coverage for the nonpregnancy-related medical expenses of spouses of employees.

SUMMARY OF ARGUMENT

The issue in this case centers on whether Congress, by enacting the PDA, intended to regulate an employer's provision of hospital and medical benefits for the pregnancies of spouses of employees. Emerson submits that the answer to this question clearly is "no". The PDA requires, in pertinent part, that "women affected by pregnancy...be treated the same for all employment related purposes...as other persons similar in their ability or inability to work." Thus, the plain language of the PDA reflects a Congressional intent that pregnant *employees* and *applicants for employment* be treated like all other *employees and applicants* in terms of their ability or inability to work. Necessarily, the women protected by the PDA must be employees or applicants. The PDA does not, by its terms, purport to regulate benefits for certain categories of employee dependents, such as spouses of male employees, and the PDA in no way changed the existing law applicable to pregnancies of employee dependents.*

The legislative history of the PDA confirms that its purpose was to eliminate arbitrary barriers to equal employment opportunity for female *employees and applicants*, and that Congress did not intend to change the law with respect to the provision of dependent or spousal benefits. Interpretations by the House and Senate Committees that considered the PDA establish that it was intended to protect only female employees and applicants and the PDA's chief sponsor and leading spokesperson in the Senate, Senator Harrison Williams, unequivocally declared on the floor of the Senate that the PDA did not apply to dependents. Finally, in adopting the PDA, Congress, *as the EEOC admitted in adopting its Final*

* Significantly, EEOC admits that an employer can, under Title VII, lawfully limit medical coverage for other dependents of employees, i.e., daughters of employees, by refusing to provide pregnancy-related medical coverage for those dependents or by putting a cap on that coverage. 29 C.F.R. Part 1604 (Appendix) (1982) (Question and Answer No. 21).

Interpretive Guidelines, 44 Fed. Reg. 23,804 (April 20, 1979), left the question of dependents' benefits to be resolved by general Title VII principles. Those principles, as enunciated in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977), and the reasoning of *Geduldig v. Aiello*, 417 U.S. 484 (1974), conclusively show that the health benefits plans of Newport News and Emerson, and similar plans of other employers throughout the country, are lawful.

EEOC's position in this case, as well as in other cases on the same issue pending around the country, fully discussed *infra*, had its origin in certain Questions and Answers on the Pregnancy Discrimination Act of 1978, 29 C.F.R. Part 1604 (Appendix) (1982). EEOC contends that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions."* In adopting its final Questions and Answers,

---

* Questions and Answers Nos. 21 and 22, the two involved here, are as follows:

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions. But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of the

(footnote continued on next page)

EEOC explained its interpretation of the law on pregnancy benefits for dependents as follows:

> To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the Pregnancy Discrimination Act states explicitly that the existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents.

44 Fed. Reg. 23,804 (April 20, 1979). As explained hereafter, EEOC has now taken the directly contrary position in this litigation and others that the PDA does resolve the question of spousal pregnancy benefits.

EEOC's Guidelines, which are contrary to the agency's own initial position and which attempt to expand Title VII's protection against pregnancy-related discrimination against female employees and applicants to spouses of employees, are contrary to law, and of no force or effect. The Fourth Circuit's decision that the health benefits plan covering spouses of employees of Newport News is unlawful should therefore be reversed.

---

spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

ARGUMENT

I.

A Limitation On Pregnancy Coverage For Spouses Of Male Employees Is Consistent With The Principles Of Title VII Enunciated In *General Electric Co. v. Gilbert* and The Reasoning Of *Geduldig v. Aiello.*

The analysis of the legality under Title VII of an employer's health benefits plans must begin with the landmark decision of the Court in *General Electric Co. v. Gilbert, supra.* There, the Court held that it was not unlawful under Title VII for an employer to offer a disability plan which provided nonoccupational sickness and accident benefits to all employees, but excluded from its coverage disabilities arising from pregnancy. The Court stated, "... an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all." 429 U.S. at 136.

In so holding, the Court applied the principles previously enunciated in *Geduldig v. Aiello, supra.* Although *Geduldig* dealt with whether the exclusion of pregnancy coverage from a disability program established under California law violated the Equal Protection Clause of the Fourteenth Amendment, the Court nevertheless applied *Geduldig's* reasoning. The Court in *Gilbert,* quoting *Geduldig,* stated:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normally, pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are

> mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

429 U.S. at 134-35, *quoting* 417 U.S. at 496-97.

Relying on this reasoning, the Court in *Gilbert* went on to hold that General Electric's complete exclusion of pregnancy as a compensable disability was not gender-based by its terms, did not have a gender-based effect, and was not a pretext to effect gender-based discrimination.

It is clear that under the Court's standards enunciated in *Gilbert* and *Geduldig*, the health benefits plans of Newport News, Emerson, and similar plans of other employers throughout the country, do not discriminate against male employees in violation of Title VII. The health benefits plans for employees of Newport News and Emerson, unlike the plan for employees at issue in *Gilbert*, do not completely exclude the pregnancy-related hospital and medical expenses of male employees' spouses from coverage; they merely place a limit, for economic reasons, on the amount to be paid for these expenses. Further, the plan in *Gilbert* totally excluded from coverage the pregnancy-related disabilities of female *employees*, whereas, under the health benefits plans of Newport News and Emerson, *the limitation applies only to spouses of male employees*. It is obvious, therefore, that if a health benefits plan which completely excludes pregnancy coverage for employees, such as the plan in *Gilbert*, does not violate Title

VII, at least prior to the PDA, then employer health benefits plans that merely limit coverage of the pregnancy-related hospital and medical expenses incurred by the spouses of male employees must also be lawful.

Moreover, the health benefits plans of Newport News and Emerson are even-handed and facially neutral. The fact that the spouses of female employees do not become pregnant does not create gender-based discrimination or a gender-based effect under *Gilbert* and *Geduldig*. To paraphrase the Court in *Gilbert* and *Geduldig*, the program divides recipients into two groups — employees with pregnant spouses and employees without pregnant spouses. While the first group is exclusively male, the second includes members of both sexes. 429 U.S. at 135, *quoting* 417 U.S. at 497 n.20. Pregnancy-related disabilities of spouses constitute an additional risk, unique to male employees, and the failure to compensate them for this risk does not destroy the presumed parity of benefits, accruing to men and women alike, from the facially even-handed inclusion of risks. 429 U.S. at 139.

Further, in *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir.), *petition for reh'g filed*, No. 81-4542 (July 27, 1982), the United States Court of Appeals for the Ninth Circuit rejected the identical argument EEOC raises here and held that an employer health benefits plan essentially identical to the health benefits plans of Newsport News and Emerson was lawful. The court held:

> [The PDA] can be divided into two clauses separated by the semicolon. The first is simply definitional: The word 'sex' as used in § 703(a) is to be read to mean 'pregnancy, childbirth or related medical conditions.' Reading PDA against § 703(a)(1) the latter now provides that it shall be an unlawful employment practice for an employer to 'discriminate against any individual with respect to his compensation * * * because of *such individual's* * * * pregnancy, childbirth or related medical conditions.' (Emphasis supplied.) The amendment would have the same effect on

§ 703(a)(2). This can hardly be read to apply to male employees. By choosing the definitional form of amendment, Congress has expressly limited the scope of its action to women employees.

The second clause in its reference to women employees ('employment-related purposes'; 'other persons not so affected but similar in their abilitity or inability to work') clarified the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent.

The legislative history of PDA provides further support for this construction of its terms. While it does contain some contradictory expressions on the part of some members of Congress as to what they believed the legislation did or should provide in the way of dependents' benefits, the Senate Committee Report leaves no room for doubt. There it is stated:

> 'Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.'

680 F.2d at 1245-46.

EEOC's tortured reasoning also has been rejected in *EEOC v. Joslyn Manufacturing and Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal filed*, No. 82-1634 (7th Cir. April 14, 1982). In *Joslyn*, the court unequivocally rejected EEOC's interpretation of the PDA and its legislative history. *Id.* at 1142-43.

Thus, under ordinary principles of Title VII established in *Gilbert* and the reasoning of *Geduldig*, employer health benefits plans that do not provide for, or limit, pregnancy-related benefits for spouses of employees are nondiscriminatory in design and effect and do not violate Title VII.

II.

In Enacting The Pregnancy Discrimination Act Congress Did Not Extend Its Coverage To Spouses Or Other Dependents of Employees.

On October 31, 1978, Congress enacted the PDA. The purpose of the PDA was to prohibit an employer from excluding pregnancy coverage from its health benefits plans, *but only as those plans applied to employees.** This is so because Title VII, the statute that the PDA amended, only applies to employees and applicants. 42 U.S.C. § 2000e-2. In view of the Court's decisions in *Gilbert* and *Geduldig*, it is EEOC's burden to demonstrate that the PDA applies to benefits for dependents of employees. The language of the statute and clear expressions of legislative intent demonstrate, however, that the PDA does not apply to the limitation on spousal pregnancy benefits at issue in this case.

In the Senate Report accompanying the PDA, it was stated that "the question in regard to dependents' benefits would be determined on the basis of existing title VII principles." S. Rep. No. 331, 95th Cong., 1st Sess. 6 (1977). Thus, the PDA changed preexisting Title VII law with regard to pregnancy *only* with respect to employees and

* The PDA, by its terms, did not apply to fringe benefits programs that were in effect on October 31, 1978, until April 29, 1979. Section 2, Public Law 95-555. Accordingly, if the Court were to find, which it should not, that the PDA extends to spouses of male employees, any liability of Newport News, Emerson and employers throughout the country with similar health benefits plans should, at a maximum, be from April 29, 1979 forward.

applicants for employment. As far as spouses and other dependents of employees were concerned, the pre-PDA principles of Title VII as enunciated in *Gilbert*, adopting the reasoning of *Geduldig*, would continue to apply. As the *Lockheed* court held:

> It is thus clear that in enacting PDA, Congress had in mind the fact that a question was presented as to dependent benefits and deliberately chose not to deal with it. The Senate Report explicitly states that the basic purpose of the legislation was to protect women employees; that Congress did not regard the bill as altering the basic principles of Title VII respecting sexual discrimination and intended that those unaltered basic principles would apply in determining dependent benefits. In the eyes of Congress then, PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees.

680 F.2d at 1246.

Therefore, unless it can be shown that the PDA was intended to reach spouses of employees, the challenged provisions of the health benefits plans of Newport News, Emerson and other employers around the country should be analyzed under the principles enunciated in *Gilbert* and *Geduldig*. For the reasons stated below, EEOC cannot possibly show that the Newport News and similar employer health benefits plans are inconsistent with the Court's decisions in *Gilbert* and *Geduldig* or that the PDA extends to dependents of employees.

III.

The Plain Meaning Of The Pregnancy Discrimination Act Shows That It Covers Employees And Applicants For Employment, Not Dependents of Employees.

The PDA on its face clearly prohibits discrimination based on pregnancy only with respect to employees and applicants for employment, requiring that "...women affected by pregnancy... shall be treated the same for all *employment-related purposes*, including ... fringe benefit[s], as other persons not so affected but similar in their *ability* or *inability to work*...." The emphasized phrases obviously indicate that the PDA only protects pregnant women who are employees or applicants for employment. "To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee." *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 667 F.2d 448, 452 (4th Cir. 1981) (Hall, Circuit Judge dissenting), *aff'd en banc*, 682 F.2d 113 (4th Cir. 1982) (Haynsworth, Widener and Hall, Circuit Judges dissenting).

EEOC's Final Interpretive Guidelines distort the PDA by claiming that pregnancy is to be treated the same as all other disabilities for all employment-related purposes. However, it is not pregnancy that is to be treated the same as other disabilities for all employment-related purposes. Rather, *women* affected by pregnancy are to be treated the same for employment-related purposes as other persons similarly affected in their ability or inability to work. Obviously, such women can only be treated similarly if they are employees.

The limitation of the PDA to working women, and not spouses of male employees, apparent from the plain language of the statute, is also confirmed by the legislative history of the PDA. The clear intent of Congress in enacting the PDA was to "insure that *working women* are

protected against all forms of employment discrimination based on sex." S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977) (emphasis added). The PDA "does not change the application of title VII to sex discrimination in any other way." *Id.* at 4.

Senator Williams, chief sponsor of the Senate Bill (S. 995) that became the PDA, and Chairman of the Senate Committee on Labor and Human Resources and its Subcommittee on Labor, which considered the bill, made numerous remarks reflecting the Congressional intent to change existing Title VII law only as it applied to women who are employees and applicants.* In his foreword to the report by the Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978, Pub. L. 95-555* (Comm. Print 1979), the Senator stated:

> *The Act provides an essential protection for working women.* The number of women *in the labor force* has increased dramatically in recent years. Most of these *women are working* or seeking work because of the economic need to support themselves or their families. It is expected that this trend of *increasing participation by women in the workforce* will continue in the future and that an increasing proportion of *working women* will be those who are mothers. It is essential that these women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy.

Id. at III (emphasis added).

Senator Williams' remarks upon introducing the PDA similarly reflect the intent to protect *pregnant employees*, and not pregnant dependents of employees. "[T]he

* These remarks are entitled to great deference in determining the Congressional intent behind the PDA since "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95, *reh'g denied*, 341 U.S. 956 (1951).

Supreme Court's decision ... in the case of Gilbert against General Electric Co. came as a deep disappointment to *working women* across the Nation.... Now, once again, it has become incumbent upon the Congress to act. *Working women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. 7,539-40 (1977) (emphasis added).*

In a colloquy between Senator Williams and Senator Orrin Hatch during the final Senate debate on the PDA, it became unmistakably clear that the PDA was not to extend to spouses or other dependents of employees:

> Mr. HATCH: The phrase "women affected by pregnancy, childbirth or related medical conditions," ... appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.
>
> Indeed, *under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment....*
>
> Could the sponsors clarify exactly whom that phrase intends to cover?

---

* Senator Williams' comments during the floor debate on S. 995 further emphasize that the intent was to protect female employees:

> It is most important that this protection be provided to our Nation's *working women.*
>
> • • • • •
>
> This legislation is also important because, in the long run, it will permit the 36 million *working American women* to assume their rightful place, and make a full contribution in our Nation's economy.
>
> • • • • •
>
> The central purpose of the bill is to require that *women workers* be treated equally with other employees on the basis of *their ability or inability to work* .... In this way the law will protect *women* from the full range of discriminatory practices which have adversely affected their status *in the workforce.*

123 Cong. Rec. 29,385 (1977).

Mr. WILLIAMS: With regard to more [sic] maintenance plans for pregnancy-related disabilities, *I do not see how this language could be misunderstood.*

Mr. HATCH: Because it is very broadly drafted and if we say "affected by" it, that includes all of those illustrations that I have just enumerated. *If it does not, I want to be sure that everybody knows from the record that it only refers to the woman employee who is pregnant or who becomes pregnant after her employment.*

Mr. WILLIAMS: If there is any ambiguity, with regard to incom maintenance plans, I cannot see it. '...shall be treated the same for all employment-related purposes.' *I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity let it be clear here now that this is very precise. It deals with a woman, a woman who is an employee,* an employee, in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when *she cannot work* because of childbirth or anything related to childbirth is excluded. *It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.*

Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of any female employee.

Mr. WILLIAMS: Exactly. It does not.

Mr. HATCH: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, *what it means is that this act only applies to the particular*

woman who is actually pregnant, who is an employee and has become pregnant after her employment?

Mr. WILLIAMS: *Exactly.*

123 Cong. Rec. 29,643-44 (1977) (emphasis added).

It is hard to imagine a clearer expression of legislative intent. In unmistakable terms, Senator Williams, the principal sponsor, stated that the statute applied only to women employees, not dependents.

The remarks of Senator Jacob Javits, the ranking minority member of the Senate Committee on Labor and Human Resources further confirm that the PDA was intended to protect female employees and applicants, and not spouses or other dependents of employees:

> *This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships.* Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant *women employees* to the point where it was last year, before the Supreme Court's decision in *Gilbert v. General Electric Corp.*, 429 U.S. 125 (1976).
>
> * * *
>
> This approach represents only basic fairness for *employees* who become pregnant. *Without this legislation, they may face a series of obstacles to continuing the pregnancy to term while maintaining their jobs and their incomes. Many women temporarily disabled by pregnancy have been forced to take leave without pay or to resign.*
>
> * * *

> Mr. President, we can no longer in this country legislate with regard to *women workers* on the basis of outdated stereotypes and myths.

123 Cong. Rec. 29,387 (1977) (emphasis added).

The proceedings in the Senate and the House contain numerous similar expressions by proponents of the PDA evidencing Congressional preoccupation and concern with the status of *working women*.* Moreover, both the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor, which considered the bills resulting in the PDA, made clear that their limited purpose was "to ensure that *working women* are protected against all forms of employment discrimination based on sex," S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977), and that "[t]he bill[s] would simply require that pregnant women be treated the same as *other employees* on the basis of their ability or inability to work." H.R. Rep. No. 95-948, 95th Cong., 2d. Sess. 4 (1978) (emphasis added).

Finally, the Senate Committee on Labor and Human Resources specifically addressed the issue of dependents' benefits and made it clear that the PDA does not reach that far:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees

---

* Such expressions appear in the remarks of Senator Brooke, 123 Cong. Rec. 7,541, 29,664 (1977); Senator Mathias, *id.* at 7,541-42, 29,663-64; Senator Kennedy, *id.* at 29,388-89; Congressman Hawkins, *id.* at 10,581-83 and 124 Cong. Rec. 21,435 (1978) (The PDA was introduced "specifically to define the standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work."); Congressman Sarasin, *id.* at 21,436-37; Congressman Green, *id.* at 21,437; Congressman Quie, *id.* at 21,439; Congressman Corrada, *id.* at 21,439; Congresswoman Chilsholm, *id.* at 21,440 ("The issue is whether or not we as leaders of this country will assure equality at the workplace for pregnant workers."); Congressman LaFalce, *id.* at 21,440-41; Congresswoman Collins, *id.* at 21,441; Congressman Whalen, *id.* at 21,441-42; Congressman Tsongas, *id.* at 21,442.

> themselves. In this context it must be remembered that the basic purpose of this bill is to *protect women employees*, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore, *the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.*

S. Rep. No. 331 at 5-6 (emphasis added).

In sum, the language of the PDA, the remarks of its chief sponsor, the remarks of other members of Congress, and the language of the Senate and House Reports that accompanied the PDA overwhelmingly indicate that the PDA was intended to protect working women employees and applicants and not the spouses or other dependents of employees.* The question of the legality of the Newport News and similar employer health benefits plans is to be resolved under the Title VII principles enunciated in *Gilbert* and the reasoning of *Geduldig* and, as stated earlier, they are not violated in any way by the limitation placed on benefits for the pregnancy-related hospital and medical expenses incurred by the spouses of employees.

IV.

The Court Owes No Deference To EEOC's Guidelines That Interpret Title VII's Protection Against Pregnancy-Related Discrimination As Extending To Spouses And Other Dependents Of Employees. These Guidelines Are Contrary To Law And Of No Force Or Effect.

It is clear that the health benefits plans of Newport News, Emerson and other employers do not violate the

* Since the additional costs incurred in extending the PDA to dependents of employees would be so great, one can reasonably expect that Congress would have taken pains to clearly express its intent that the PDA apply to dependents. It did not and the inference is readily apparent. The PDA does not apply to dependents.

principles set forth in *Gilbert* and *Geduldig*. It is also clear that the PDA does not extend the ban against pregnancy-related discrimination to spouses or other dependents of employees. Therefore, the only conceivable basis upon which a claim for relief can be premised in this case is EEOC's self-serving Questions and Answers on the Pregnancy Discrimination Act of 1978, 29 C.F.R. Part 1604 (Appendix) (1982).

EEOC's current interpretation of the PDA's legislative history and the applicability of the statute to dependents' pregnancy benefits is inconsistent with EEOC's position as set forth in its supplementary information regarding the very same Questions and Answers. This supplementary information states:

> To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. *The legislative history of the Pregnancy Discrimination Act states explicitly that the existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents.* (S. Rep. No. 95-331 at 6).

44 Fed. Reg. 23,804 (April 20, 1979) (emphasis added).

In fact, in testimony before the House subcommittee that considered the PDA, Assistant Attorney General Days stated:

> The bill is to equalize opportunities for employees. It is to make certain that they are not disadvantaged in the work force by certain discriminations with respect to disabilities. *I don't understand that you reach dependents and whatever coverage there might be of dependents under plans.*

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House

Comm. on Education and Labor, 95th Cong., 1st Sess. 187 (1977) (emphasis added).

EEOC now belatedly takes the position that the legislative history of the PDA demonstrates an intention by Congress to resolve the question of dependents' benefits. In view of this inconsistency between EEOC's past and current interpretations of the PDA, EEOC's current interpretation of the PDA's legislative history is entitled to no weight at all.

EEOC's interpretation of general Title VII principles, as set forth in Questions and Answers Nos. 21 and 22, clearly is contrary to the pre-PDA principles enunciated in *Gilbert* and *Geduldig* and contrary to the plain language and intent of the PDA. Questions and Answers Nos. 21 and 22 are, therefore, contrary to law and of no force or effect.

Any inquiry into the weight to be accorded an EEOC guideline must start with the caution that when Congress enacted Title VII it did not confer on EEOC the authority to promulgate substantive rules or regulations. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *EEOC v. Emerson Electric Co.*, 539 F. Supp. 158, 159 (E.D. Mo.), *appeal filed*, No. 82-1647 (8th Cir. May 27, 1982). Finding that Questions and Answers Nos. 21 and 22 were "contrary to the intent of Congress," the district court in *Emerson* correctly refused to defer to them. Instead, the court in *Emerson* looked to the PDA and correctly found that it only applies to employees and applicants for employment. Observing that the legislative history of the PDA clearly indicated that the question of pregnancy benefits for spouses and other dependents of employees was to be determined on the basis of existing Title VII principles, the court in *Emerson* analyzed the health benefits plans in question under the principles of *Gilbert* and *Geduldig* and found them to be lawful.

The reasoning of the court in *Emerson* is correct and should be adopted here, as it was by the courts in *Lockheed* and *Joslyn*. EEOC has presented this Court with a far-

fetched, belated, and attenuated theory of sex discrimination which is entitled to no deference at all.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Fourth Circuit and reject EEOC's attempt to force employers to provide pregnancy-related medical coverage for spouses of employees to the same extent that they provide coverage for the nonpregnancy-related hospital and medical expenses of spouses of employees.

Dated: New York, New York
January 20, 1983

Respectfully submitted,

FREDERICK T. SHEA
101 Park Avenue
New York, New York 10178
(212) 808-7800

ROBERT H. MCROBERTS, SR.
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

Counsel for Amicus Curiae
Emerson Electric Company

Of Counsel:

KELLEY DRYE & WARREN
EUGENE T. D'ABLEMONT
JOHN F. GIBBONS

BRYAN, CAVE, MCPHEETERS
& MCROBERTS
THOMAS C. WALSH

Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
AND DRYDOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
LORENCE L. KESSLER *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment Advisory Council

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE COMMISSION'S POSITION ON PREGNANCY BENEFITS FOR DEPENDENTS OF EMPLOYEES IS CONTRARY TO BOTH THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT OF 1978 AND ITS LEGISLATIVE HISTORY	7
A. The Plain Meaning of the Pregnancy Discrimination Act of 1978 Limits the Scope of that Statute to Pregnant Employees and Precludes Its Application to Pregnant Dependents of Employees	7
B. The Legislative History of the Pregnancy Discrimination Act Supports the Conclusion That This Statute Does Not Reach the Issue of Dependents' Benefits	10
C. The Commission's Arguments to This Court Relying on the Language and the Legislative History of the Pregnancy Discrimination Act Are Not Consistent with the Rationale Set Forth By the Commission When It First Issued Its Interpretive Guidelines	14
II. THE SEGMENTS OF THE LEGISLATIVE HISTORY RELIED UPON BY THE COMMISSION FAIL TO SUPPORT THE COMMISSION'S INTERPRETATION OF THE ACT	15

TABLE OF CONTENTS—Continued

Page

III. THE APPROACH OF THE FOURTH CIRCUIT MAJORITY IS CONTRARY TO THE PRINCIPLES OF TITLE VII WHICH CONGRESS INTENDED WOULD APPLY TO THE QUESTION OF DEPENDENTS' BENEFITS 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 9, 16
Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) 22
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) 22-23
Dothard v. Rawlinson, 433 U.S. 321 (1977) 23
EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) 22
EEOC v. Emerson Electric Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 3
EEOC v. Joslyn Manufacturing & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) 3
EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir. 1982) 3, 6, 8, 23
Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) .. 23
Geduldig v. Aiello, 417 U.S. 484 (1974) 17, 23
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 4, 15, 21
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 9
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 7
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973) 22
United States v. Turkette, 452 U.S. 576 (1981) 16
United Teachers—Los Angeles v. Board of Education, 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal. 1982) 3

STATUTES

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Title VII) 2
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. § 2706, 42 U.S.C. § 2000e-(k) (1978 Supp.) ..... *passim*

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
Hearings on S. 995, 95th Cong., 1st Sess., before the Subcommittee on Labor of the Committee on Human Resources, Senate (April 26, 27 and 29, 1977)	16
Hearings on H.R. 5055 and H.R. 6075 before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (April 6, 1977)	19
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (March 13, 1978)	10, 12
Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (1980)	*passim*
S. Rep. No. 95-331, 1st Sess. (July 6, 1977)	10, 21
MISCELLANEOUS MATERIALS	
Equal Employment Opportunity Commission, Final Interpretive Guidelines on Sex Discrimination, including Questions and Answers on the Pregnancy Discrimination Act, 44 Fed. Reg. 23804 (29 C.F.R. Part 1604.10, and Appendix)	4, 14
Sands, Sutherland Statutory Construction (4th ed. 1973)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Fourth Circuit be reversed, and thus the brief supports the position of the Petitioner.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual

employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-(k) (1978 Supp.), and these members are affected by the issue of whether the Pregnancy Discrimination Act can be interpreted to require employers to provide disability coverage for the pregnancies of the dependents of employees. They are directly concerned with the question presented for review in this case: Does an employer that provides health insurance benefits for employees and their dependents discriminate against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing only limited coverage for the pregnancy-related expenses incurred by the dependents of employees. Because of its interest in this issue, the Council participated as amicus curiae in the appeal in this case in the Fourth Circuit and in an appeal in a separate case in the Ninth Circuit which raised the same question. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 667 F.2d 448 (4th Cir.), *adopted en banc*, 682 F.2d 113 (1982), and *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), *petition for cert. filed* (U.S. Dec. 15, 1982) (No. 82-1006).[1]

---

[1] Because of its interest in equal employment opportunity issues, the Council has participated as amicus curiae in other cases before

STATEMENT OF THE CASE

The case now before the Court is one of several in which federal courts have been asked to rule on the validity of the Equal Employment Opportunity Commission's interpretation of the law on sex discrimination with respect to pregnancy benefits for dependents of employees. In this case, the Fourth Circuit Court of Appeals, in a 5 to 3 decision, supported the Commission's interpretation. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 682 F.2d 113, *adopting en banc*, 667 F.2d 448 (1982). This decision reversed a district court ruling which had declared the Commission's interpretation to be contrary to law, 510 F. Supp. 66 (E.D. Va. 1981).[2]

This case arises from a declaratory judgment action filed by Newport News Shipbuilding and Dry Dock Company ("Shipyard"), the Petitioner in this Court. The district court found that the Shipyard maintains a medical plan which pays a major part of the costs of medical and hospital care for non-occupational illnesses and accidents of the dependents of Shipyard employees. Under the plan, maternity benefits for dependents of all em-

---

this Court. *See e.g., Arizona Governing Committee v. Norris*, (U.S. No. 82-52); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

[2] In a case raising similar issues, *EEOC v. Lockheed Missiles and Space Co.*, 680 F.2d 1243 (1982), the Ninth Circuit Court of Appeals rejected the Commission's interpretation, as did district courts in *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982), and *EEOC v. Joslyn Mfg. & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982). In *United Teachers—Los Angeles v. Board of Education*, 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal. 1982), the district court adopted the approach of the Commission, but the vitality of that decision is doubtful in light of the Ninth Circuit's subsequent ruling to the contrary in *Lockheed*.

ployees are limited to $500 of the hospital charges, with additional allowances for hospital costs only if there are complications.

The Commission's interpretation of the law with respect to providing pregnancy benefits for the dependents of employees requires that if an employer provides coverage for the medical conditions of the spouses of employees, the level of coverage for pregnancy-related medical conditions must be the same as the level of coverage for all other medical conditions of the spouses of female employees. This interpretation is contained in Question and Answer No. 21 and No. 22 appended to the Final Interpretive Guidelines on sex discrimination published by the Commission on April 20, 1979.[3] The interpretive guidelines were issued following enactment of the Pregnancy Discrimination Act of 1978 as an amendment to Title VII of the Civil Rights Act of 1964, as amended.

The district court found that the legislative history of the Pregnancy Discrimination Act explicitly stated that the legislation was not intended to reach the issue of dependents' benefits and that the question of dependents' benefits would have to be resolved utilizing existing principles of Title VII law. The district court concluded that the Pregnancy Discrimination Act did not change the application of Title VII to sex discrimination in any way except for those situations involving pregnant employees or applicants for employment. The court held that in situations not involving pregnant employees or applicants for employment, the principles of Title VII law remain those enunciated by this Court, prior to the Pregnancy Discrimination Act, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In that decision, the Court held that the exclusion of pregnancy-related benefits from a disability program does not constitute gender-based dis-

---

[3] The relevant portions of Title VII, the Pregnancy Discrimination Act, and the Commission's Questions and Answers are set forth in the Petition for a Writ of Certiorari filed September 10, 1982.

crimination and that, absent a showing of gender-based effect, there could be no violation of Title VII.

Applying this principle, the district court held that the Shipyard's medical plan, which provides disability coverage for dependents of employees but limits that coverage with respect to the pregnancy-related expenses of dependent spouses of employees, did not constitute gender-based discrimination against male employees. The district court further held that the Commission's interpretive guidelines, as expressed in Questions and Answers No. 21 and No. 22, are contrary to law and of no force and effect.

The district court's decision was reversed in the Fourth Circuit where the panel majority adopted the view that the intent of the new statute was to equate pregnancy with sex and thus to make all distinctions based on pregnancy distinctions based on sex. 667 F.2d at 451. The dissent in the Fourth Circuit reasoned that pregnancy-based classifications are legal except to the extent that *General Electric* has been limited by the new law, and that had Congress intended to entirely undo *General Electric*, it would have done so without the reference in the statute to a woman's ability or inability to work. 667 F.2d at 452. Upon rehearing *en banc*, five judges adopted the opinion of the panel majority and three judges adopted the opinion of the dissent. 682 F.2d 113.

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act represents a Congressional judgment that pregnancy must not be a basis for arbitrary distinctions which limit the employment opportunities of pregnant employees or applicants for employment. Specifically, the language of the Act provides that for employment purposes women affected by pregnancy are to be treated the same as other individuals on the basis of their "ability or inability to work."

In seeking to expand the scope of the PDA so as to apply to the pregnancies of dependents, the Commission has ignored the inherent limitation expressed by the

"ability or inability to work" language. This same weakness is evident in the opinion of the Fourth Circuit majority, which adopted the Commission's approach. In sharp contrast, the approach of the Ninth Circuit in *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (1982), and the approach of the dissent in the Fourth Circuit both accommodate the "ability or inability to work" language, and it is these approaches which should guide this Court's consideration of the issue here. Furthermore, the Commission and the Fourth Circuit majority have virtually ignored the explicit language of the legislative history of the PDA, which states that the purpose of the Act is to eliminate arbitrary barriers to equal employment opportunity for pregnant employees, and that the Act *does not* reach the question of dependents' benefits. Congress intended that question to be resolved by using basic principles of Title VII which were unchanged by the PDA.

The Commission's arguments that its interpretation is supported by the plain language of the PDA and its legislative history are not consistent with the rationale expressed by the Commission when it first published its interpretive guidelines in April 1979. At that time, the Commission explained that its guidelines on dependents' benefits were arrived at by utilizing existing Title VII principles rather than the PDA.

In attempting to justify its interpretation of the statute in this Court, the Commission has relied on a few remarks taken from the legislative debates. These passages, however, do not constitute the type of clear and convincing legislative history required to overcome the specific language of the Senate Committee Report and the statements of the bill's principal sponsor indicating that the legislation applied only to pregnant employees. In light of the very narrow scope of the PDA, the district court correctly ruled that in situations not involving pregnant employees or applicants for employment, a limitation on pregnancy-related benefits does not constitute gender-based employment discrimination.

ARGUMENT

I. THE COMMISSION'S POSITION ON PREGNANCY BENEFITS FOR DEPENDENTS OF EMPLOYEES IS CONTRARY TO BOTH THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT OF 1978 AND ITS LEGISLATIVE HISTORY.

A. The Plain Meaning of the Pregnancy Discrimination Act of 1978 Limits the Scope of that Statute to Pregnant Employees and Precludes Its Application to Pregnant Dependents of Employees.

The plain language of the Pregnancy Discrimination Act of 1978 (PDA) requires that for employment purposes, women affected by pregnancy are to be treated the same as other persons who are "similar in their ability or inability to work." The Commission discounts this language and asserts that the scope of the statute is not limited to employees. It asks this Court to approve an expanded interpretation of the statute which essentially would require that dependents affected by pregnancy are to be treated the same as other dependents. The "ability or inability to work" language cannot simply be read out of the statute. As this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980), the Commission's " 'interpretation' of the statute cannot supersede the language chosen by the Congress." In this instance, the language chosen by Congress—"similar in their ability or inability to work"—is a strong indication that Congress did not contemplate that this statute would be applied to govern the treatment of pregnant dependents.

In the decision of the Fourth Circuit,[4] the majority opinion indicates that the "similar in their ability or inability to work" language does not suggest that the pregnant person must be an employee. This conclusion appears to ignore the fact that only employees (or applicants for employment) reasonably may be compared to one another

---

[4] *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 667 F.2d 448 (4th Cir.), *adopted en banc*, 682 F.2d 113 (1982).

on the basis of similarity in their "ability or inability to work." Indeed, as the dissent pointed out:

> To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee. To hold otherwise is to simply ignore the language of the Act.

Newport News, 667 F.2d at 452 (J. Hall, dissenting). In considering what weight should be accorded to the reasoning in the majority opinion, it should be recognized that, in attempting to read the statute so that it "contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach," 667 F.2d at 450, the majority is at odds with the unambiguous statements in the legislative history that the Act does not reach the issue of benefits for non-employees.[8]

The reasoning of the Fourth Circuit majority was presented to the Ninth Circuit by the Commission in *EEOC v. Lockheed Missiles and Space Co.*, 680 F.2d 1243 (1982). That court rejected the Commission's arguments and concluded that by choosing the definitional form of amendment, Congress expressly limited the scope of its action to women employees. The *Lockheed* court found that the first clause of the PDA, when read together with Section 703(a)(1) of Title VII, defeats the Commission's contention that the PDA may be applied to male employees. Furthermore, the court reasoned:

> The second clause in its reference to women employees ("employment-related purposes;" "other persons not so affected but similar in their ability or inability to work") clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent.

---

[8] See discussion of legislative history of pp. 10-13, *infra*.

680 F.2d at 1245.[6] Both the approach of the Ninth Circuit and the approach of the dissent in the Fourth Circuit accommodate rather than ignore the "ability or inability to work" language included by Congress in the statute. It is well-settled that in questions of statutory construction, the starting point must be the language used by Congress, and it is assumed that the intent of Congress is expressed by the ordinary meaning of those words. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), and cases cited therein. Although the Commission asserts that nothing in the statute limits its scope to the pregnancies of employees, the plain meaning of the "ability or inability to work" language is that such a limitation was intended.[7] Further-

---

[6] The Ninth Circuit read the first clause of the PDA as a definitional clause:

> The quoted portion of § 2000e(k) can be divided into two clauses separated by the semicolon. The first is simply definitional: The word "sex" as used in § 703(a) is to be read to mean "pregnancy, childbirth or related medical conditions." Reading PDA against § 703(a)(1) the latter now provides that it shall be an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation * * * because of *such individual's* * * * pregnancy, childbirth or related medical conditions." . . . The amendment would have the same effect on § 703(a)(2). This can hardly be read to apply to male employees. By choosing the definitional form of amendment, Congress has expressly limited the scope of its action to women employees.

680 F.2d at 1245.

[7] In its "Brief for the Respondent" (hereinafter EEOC Brief), filed in response to the petition for writ of certiorari, the Commission has argued that the statute is not limited to the pregnancies of employees. See EEOC Brief at 8. The Commission suggests that the language "ability or inability to work" is similar to the phrase in 42 U.S.C. § 1981 which guarantees all persons the same rights "as is enjoyed by white citizens." The Commission points out that in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court held that Section 1981 protects both nonwhites and whites. What the Commission overlooks, however, is that the Court in *Santa Fe* began its analysis by noting that Section 1981 "ex-

more, such limitation does not lead to an absurd or futile result, since the very purpose of this legislation was to remove the barriers to equal employment opportunity for working women affected by pregnancy.[8] This purpose is served fully and fairly without expanding the statute beyond its plain meaning to include the pregnancies of non-employees.

B. The Legislative History of the Pregnancy Discrimination Act Supports the Conclusion That This Statute Does Not Reach the Issue of Dependents' Benefits.

Congress did not intend the Pregnancy Discrimination Act to apply to the issue of medical benefits for the dependents of employees. This intention is stated in a forthright manner in the Senate committee report on the proposed legislation.[9] The intention to limit the scope of

---

plicitly applies to '*all* persons' . . . ." This explicit statutory language, the Court found, was supplemented by legislative history indicating that the provision had been introduced as a "bill . . . to protect *all* persons in the United States in their civil rights . . . ." 427 U.S. at 287. In sharp contrast, the Pregnancy Discrimination Act contains no reference equivalent to the "all persons" language in Section 1981. While the reasoning of *Santa Fe* might be appropriate to support an argument that Title VII's prohibition on sex discrimination applies to men as well as women, the amicus respectfully suggests that *Santa Fe* simply does not support an argument that the PDA applies to pregnancies of persons who are not employees.

[8] *See* S. Rep. No. 95-331 (95th Cong., 1st Sess., July 6, 1977), *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 at 38 (1980) (hereinafter Legislative History). See also H. Rep. No. 95-948 (95th Cong., 2d Sess., March 13, 1978), *reprinted in* Legislative History at 147.

[9] S. Rep. No. 95-331 (95th Cong., 1st Sess., July 6, 1977) at 5-6, *reprinted in* Legislative History at 42-43, includes the following discussion of medical benefits:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that *the basic purpose of this*

the statute to the pregnancies of employees also is demonstrated dramatically in a colloquy during debate when Senator Hatch asked Senator Williams to clarify the words, "women affected by pregnancy."

Senator Williams, the principal sponsor of the Senate bill (S. 995) which was to become the PDA, was chairman of both the Senate Committee on Human Resources and its Subcommittee on Labor which considered the bill. Senator Hatch, a member of the Committee on Human Resources who ultimately voted for the bill, was active during the floor debate, offering several amendments to the bill and seeking clarification from the sponsors on various aspects of the bill. In the course of this colloquy, Senator Hatch expressed concern as to whether the phrase "women affected by pregnancy" was limited to pregnant employees:

> Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. One might even argue that other female dependents are covered . . . . Could the sponsors clarify exactly whom the phrase intends to cover?

Legislative History at 80 (September 16, 1977). Senator Williams responded that he did not see "how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee, ..." Legislative History at 80.

The Commission, apparently assuming that the meaning of the phrase "women affected by pregnancy" can be read differently for income maintenance plans than for

---

bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles (emphasis added).

medical benefits plans, has asserted that Senator Williams' remarks were limited to income maintenance plans (EEOC Brief at 10 n.11). The colloquy, however, did not end at this point. Even if it is assumed that during the above-quoted exchange Senator Williams was not giving a complete response to the question of "exactly whom that phrase intends to cover," it nevertheless may be noted that Senator Hatch continued to press his inquiry and that Senator Williams responded without equivocation or reservation:

> Senator Hatch: So the Senator is satisfied that though the committee language I brought up, "women affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?
>
> Senator Williams: Exactly.

Legislative History at 80.

The statements by Senator Williams indicating that the statute is narrowly drawn in that it applies only to pregnant employees is significant, not only because of his role as the principal sponsor of the legislation, but also because such a limitation is consistent with the purpose of the legislation as expressed numerous times in the legislative history.

The report of the Senate Human Resources Committee stated that S. 995 was introduced to "insure that working women are protected against all forms of employment discrimination based on sex."[10] In discussing the basic

---

[10] S. Rep. No. 95-331. (95th Cong., 1st Sess., July 6, 1977) at 3, *reprinted in* Legislative History at 40. Similar language appears in the record of the House Committee on Education and Labor, H. Rep. No. 95-948 (95th Cong., 2d Sess., March 13, 1978) at 3, *reprinted in* Legislative History at 149:

> H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that *working women* are protected against all forms of employment discrimination based on sex (emphasis added).

principles of the legislation, the Senate Report explained that

> the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees *on the basis of their ability or inability to work.*

Legislative History at 41 (emphasis added). During the floor debate, Senator Javits, the ranking minority member of both the Senate Human Resources Committee and its Subcommittee on Labor which considered the bill, spoke of the limited purpose to be served by the PDA:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to *pregnant women employees* to the point where it was last year, before the Supreme Court's decision in *Gilbert v. General Electric Corp.*, 426 U.S. 125 (1976).

Legislative History at 66 (emphasis added).[11]

---

[11] Similar expressions of intent were made by the principal sponsors of the legislation in the House. Congressman Hawkins, who introduced the House bill (H.R. 6075), offered the following explanation of the bill's "narrow approach" during floor debate on July 18, 1978:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify Congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers* be treated the same as other employees on the basis of their ability or inability to work. This legislation reflects no new legislative mandate of Congress. . . .

[Footnote continued on page 14]

C. The Commission's Arguments to This Court Relying on the Language and the Legislative History of the Pregnancy Discrimination Act Are Not Consistent with the Rationale Set Forth By the Commission When It First Issued Its Interpretive Guidelines.

In the brief filed in response to the petition for certiorari in this case, the Commission has argued that the language of the Pregnancy Discrimination Act makes clear that denial of pregnancy benefits to the dependents of male employees constitutes impermissible discrimination. (EEOC Brief at 7-9). It is noteworthy, however, that when it published its interpretive guidelines, the Commission acknowledged that certain questions were not answered by the language of the PDA and that existing principles of Title VII must be applied to resolve such questions. Specifically, the Commission stated:

> The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents. (S. Rep. No. 95-331 at 6.)

44 Fed. Reg. 23804, April 20, 1979. At that time, the Commission also acknowledged that its position on the issue of dependents' benefits was arrived at by using established Title VII principles, as opposed to the specific language of the new PDA. *Id.*

These statements by the Commission from 1979 appear to be at odds with the arguments set forth in the Commission's initial brief in this case. Indeed, the Commission now reads the PDA as a statute written in the broadest possible terms which is in no way limited to the

---

[11] [Continued]

Legislative History at 166 (emphasis added). Thus, the Commission is incorrect in asserting that the PDA was introduced by Congress to abolish completely all pregnancy-related distinctions in fringe benefits, whether or not an employee pregnancy is involved.

pregnancies of employees.[12] Thus, while the language of the relevant interpretive guidelines has not changed since April 1979, the Commission appears to have adopted a new rationale to serve as a basis for its interpretations. Such inconsistency made it appropriate for the district court to accord no deference to the Commission's guidelines.[13]

II. THE SEGMENTS OF THE LEGISLATIVE HISTORY RELIED UPON BY THE COMMISSION FAIL TO SUPPORT THE COMMISSION'S INTERPRETATION OF THE ACT.

The Commission has acknowledged that in considering the Pregnancy Discrimination Act, Congress focused its attention on the effects of pregnancy discrimination on women workers. The Commission argues, however, that the statute is not limited by this legislative focus on women workers. As shoring for its expanded interpretation of the statute, the Commission relies on a few passages in the legislative debates. In examining these passages, it is important to recognize the burden carried by the Commission. When the government chooses to argue that the plain meaning of a statute is not the meaning intended, it has the burden of supporting its interpretation by *clear* expressions of intent from the legislative history.[14] The Commission's arguments here fall far short of this requirement.

---

[12] See EEOC Brief, filed in response to petition for writ of certiorari, at 8.

[13] In *EEOC v. Lockheed*, the Ninth Circuit concluded that the Commission's answer to its Question 21 "is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles" 680 F.2d at 1246 n.3. See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-143 (1976) where the Court refused to give deference to the Commission's 1972 sex discrimination guidelines which conflicted with earlier pronouncements by the agency.

[14] As this Court has recognized, it is a "familiar canon of statutory construction that the starting point for interpreting a statute

In attempting to meet its burden, the Commission has offered two statements made by senators during the final debate. Most heavily relied on are the words of Senator Bayh on September 16, 1977. To put these remarks in context it must be noted that Senator Bayh was not the principal sponsor of the bill nor was he a member of the Senate Committee on Human Resources (which had considered and reported on the bill following hearings conducted by its Subcommittee on Labor). Senator Bayh was simply *one* of 30 senators listed as co-sponsors of the bill, and he spoke in support of the legislation on three separate occasions: (1) an individual statement offered to the Senate on March 18, 1977, when he placed in the record a fact sheet explaining the bill;[15] (2) in testimony on April 26, 1977, as a witness before Senator Williams' Subcommittee;[16] and (3) in remarks made during the floor debate on September 16, 1977.[17]

These three statements by Senator Bayh are virtually identical in that they begin with an outline of the Supreme Court decision in *Gilbert* and a summary of the bill's provisions. The Senator then discussed in some detail the anticipated costs which the nation's employers would have to bear as a result of the bill, and he concluded by offering specific statistics from a company in his home state to show that the costs of compliance would

---

is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), which invoked this canon in its interpretation of the language in Section 703(h) of Title VII of the Civil Rights Act of 1964, and *United States v. Turkette*, 452 U.S. 576, 580 (1981).

[15] Legislative History at 17-22.

[16] Hearings on S. 995 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 6-19 (April 26, 1977).

[17] Legislative History at 72-77.

not be burdensome. The remarks concerning pregnancy benefits for the dependents of male employees, however, appear *only* in the Senator's statement of September 16, 1977.[18] The Commission urges that these remarks indicate Senator Bayh's belief that the PDA extended to benefits for dependents. In asking the Court to accept this interpretation, however, the Commission offers no explanation as to why the Senator never once included dependents' benefits in his detailed discussions of the expected costs of this legislation. Not only is there no mention of dependents' benefits in the Senator's March 18 fact sheet or in his April 26 testimony, but there is no reference to this significant expense in his discussion of anticipated costs on September 16.

A more reasonable (and more literal) interpretation of the Senator's remarks is that he simply was stating his personal view as to the outcome when, as the Senate Committee Report provides, the issue of dependents' benefits was resolved according to existing Title VII princi-

---

[18] The Commission relies upon the following sentences taken from Senator Bayh's statement of September 16, 1977:

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

Legislative History at 75. It appears from this statement that either the Senator misspoke or he misunderstood the case law under the Fourteenth Amendment. In 1974, the Supreme Court had ruled that the decision not to include pregnancy disability in a disability insurance program did not constitute invidious discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. *Geduldig v. Aiello*, 417 U.S. 484.

ples, rather than under the PDA. Similarly, the statement by Senator Cranston relied upon by the Commission was acknowledged by the Senator to be his "own view" on a matter the Senate Committee had not addressed.[19]

Under the general principles used in interpreting legislative history, such personal views by individual legislators are accorded very little weight in determining the intent of Congress:

> [I]t can reasonably be argued that any legislator's remarks which throw light on the meaning of [the statute's] words should be admitted . . . . Although generally entitled to little probative weight, the value of such remarks could be left to depend upon how well informed their author appeared to be and how well he seemed to represent the views of his colleagues.

2A Sands, Sutherland Statutory Construction § 48.13 (4th ed. 1973).

In this instance, both Senators appear to be expressing nothing more than their own views on existing Title VII principles, rather than speaking on the scope of specific language in the bill under consideration, and Senator Bayh appears to be misinformed about existing law.[20] The remarks of these individual legislators are entirely insufficient to contradict the plain meaning of the statute itself and the straightforward language in the Senate Report indicating that the legislation applies only to pregnancies of employees. Indeed, in *EEOC v. Lockheed*, the court carefully analyzed the legislative history and reached precisely this conclusion. The Ninth Circuit reasoned that, any ambiguity from the Bayh and Cranston statements notwithstanding, "the Senate Committee Report leaves no room for doubt" that the purpose of the legislation was to protect women workers and that the

---

[19] Legislative History at 131.

[20] See note 18, *supra*.

question of dependents' benefits was to be answered by basic principles of Title VII which were unaltered by this statute.[21]

In addition to the remarks of Senators Bayh and Cranston, the Commission has sought support for its view in other so-called "legislative materials." In fact, none of these additional statements originated in the legislature.[22] The Commission has placed heavy emphasis on corres-

---

[21] *Lockheed*, 680 F.2d at 1245-1246. In *Newport News*, the Fourth Circuit's majority opinion places significant weight on the individual views of Senators Bayh and Cranston. The Fourth Circuit decision does not reflect the thorough consideration of the legislative history evident in the *Lockheed* opinion, however, and to the extent that the Fourth Circuit relied on the remarks of those individual legislators, its decision suffers the same weakness as the Commission's arguments here in that it is contrary to the language of the Senate Report indicating that the PDA applies only to the pregnancies of employees.

[22] In footnote 12 of the EEOC Brief filed in response to the petition for writ of certiorari, the Commission seeks to rely on cost figures, presented during testimony by an opponent of the bill, as an indication of the bill's broad scope. In assessing the impact of this particular testimony, the response of the committee members at the House hearings should not be overlooked. Immediately following the cited testimony, Congressman Sarasin told the witness: "Somehow it is not getting through to me. Maybe I will get a chance to discuss it further with you. I am not sure that I understand the point you are making." Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (April 6, 1971), at 121. Subsequently, Congressman Weiss stated:

> I am not sure that I had any better luck understanding the thrust of the witness who testified on the last panel than Mr. Sarasin. But what he was saying, I think, was, or at least as I perceived it, was that the amendment we are talking about seems to be directed toward pregnant workers, and his concern seemed to be directed toward the wives of male workers, the pregnant wives of male workers.

Hearings at 187. These statements appear to undercut the Commission's assumption that the Congress shared this witness's view as to the scope of the bill.

pondence from outside the legislative history which was belatedly introduced in this case at the appellate level. See EEOC Brief at 12-13. These letters by agency officials do not at any point purport to state the views of Senator Javits or any other legislator. Indeed, not only did Senator Javits never incorporate this correspondence into the legislative history, but he made it clear in his remarks during the floor debate that the purpose of the bill was to prevent discrimination against "pregnant women employees." See statement of Senator Javits cited at p. 13, *supra*.

There is no indication that these materials from outside the legislative history, rather than the language of the Senate Report, reflect the intent of Congress as a whole at the time the law was passed. These slender reeds offered by the Commission serve only to emphasize that the Commission is seeking an interpretation of the Act which goes well beyond the plainly expressed intent of the Congress. The Commission has failed to produce clear and convincing evidence from the legislative history that Congress intended the limited language of the PDA to be read in such an expanded fashion.

III. THE APPROACH OF THE FOURTH CIRCUIT MAJORITY IS CONTRARY TO THE PRINCIPLES OF TITLE VII WHICH CONGRESS INTENDED WOULD APPLY TO THE QUESTION OF DEPENDENTS' BENEFITS.

The district court correctly read the legislative history, which explicitly provided that the new Pregnancy Discrimination Act did not reach the issue of dependents' benefits and that questions of dependents' benefits would have to be resolved using existing principles of Title VII law. At the time Congress spoke these words, the existing principles of Title VII provided that the exclusion of pregnancy-related benefits from a disability program did not constitute gender-based discrimination and that, absent a showing of gender-based effect, there can be no vio-

lation of Title VII. These principles had been enunciated by the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which, of course, was the decision that prompted the Congress to take legislative action to prohibit discrimination against pregnant employees.

Thus, the district court was faced with the following considerations. Congress had stated, in very straightforward language, that its intention in the Pregnancy Discrimination Act was to protect pregnant employees against arbitrary barriers to equal employment opportunity. In similarly straightforward language, Congress also stated that the Pregnancy Discrimination Act did not change the application of Title VII to sex discrimination in any other way;[23] that the Act did not reach the question of dependents' benefits; and, that questions of dependents' benefits were to be resolved on the basis of existing Title VII principles rather than by reference to the new Act.[24] The district court here (and the Ninth Circuit in *Lockheed*) gave due weight to each of these considerations and properly reasoned that in situations not involving pregnant employees (or applicants for employment) the denial of pregnancy-related benefits is not gender-based discrimination.

In contrast to this reasoning, the Commission urges the Court to adopt a rule providing that merely because a pregnancy is involved, there is a gender-based impact on the *employee*. Such an assumption of gender-based impact on the employee cannot be made in cases where the employee is not pregnant. The weakness in the Commission's approach becomes apparent when one tries to follow the gender-based impact along a line from the initial pregnancy classification back to the employee who is alleged to be the victim of discrimination. If the preg-

---

[23] S. Rep. No. 95-331 at 4, *reprinted in* Legislative History at 41.

[24] S. Rep. No. 95-331 at 5-6, *reprinted in* Legislative History at 42-43.

nant individual is herself that employee, the path is traveled in a single step, and the basis for that step is the Pregnancy Discrimination Act which provides that classification on the basis of pregnancy is gender-based discrimination against the pregnant person. But, when it is a dependent who is pregnant, an extra step is necessary if gender-based impact is to reach the non-pregnant employee. The Commission must demonstrate not only that there is an impact on the non-pregnant employee, but also must show that the impact is gender-based. The flaw in the Commission's approach to the issue is that it has made this extra leap without any statutory justification.

The Commission's brief cites no authority to show that the impact on the non-pregnant employee is gender-based. In the final portion of its brief, the Commission does cite cases to show that a male employee may have a legitimate cause of action under Title VII for sex discrimination. But, in each of those cases, the gender-based impact on the male employees was demonstrated by the fact that the employer had been treating all males in one manner and all females in another. In *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1042 (4th Cir. 1976), (EEOC Brief at 6 n.6), for example, the vesting provisions of the employer's retirement plan were different for men than for women. A female employee's share of the pension fund vested at the rate of 10% a year, while a male employee's share of the fund vested at 5% a year. This practice created two groups of employees, one group exclusively male and the other group exclusively female. In each of the other cases cited by the Commission, the challenged employment practice had a similarly obvious gender-based impact on the complaining employees. See *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (employer plan paid males smaller death benefits than female counterparts); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) (employer maintained different mandatory retirement age for men than for women); *Diaz v. Pan American World Airways,*

Inc., 442 F.2d 385 (5th Cir. 1971) (employer restricted its hiring for job of flight cabin attendant to females).[25]

Thus, the Commission's discussion of basic Title VII principles offers no authorization for the Commission to leap from the fact of a pregnancy classification in the dependents' benefit plan to the conclusion that the classification has an impact on employees which is so inextricably sex-linked in its consequences as to be a violation of Title VII. Instead, in its effort to show gender-based impact on the employee, the Commission has relied simply on *a fortiori* reasoning.[26]

The inappropriateness of such reasoning here is demonstrated by using the type of analysis applied by this Court in *Geduldig v. Aiello*, 417 U.S. 484, 496-497 (1974). The lack of identity between the excluded disability (pregnancy) and the gender of the alleged victim of discrimination is significantly greater under the Shipyard's program than under the program at issue in *Geduldig*.[27]

---

[25] It should be noted that *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975), cited in the Commission's discussion of basic Title VII principles (EEOC Brief at 6), involved a claim filed under 42 U.S.C. § 1981 rather than under Title VII.

[26] The issue in this case, of whether the statute itself authorizes such a presumption of sex-linked impact, should not be confused with those cases in which there has been *evidence* introduced to show that an otherwise facially neutral requirement has a significantly discriminatory impact. *See, i.e., Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[27] In *Geduldig*, the Court reasoned that the disability program divided the employees "into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 497. See also, *EEOC v. Lockheed*, 680 F.2d at 1246-1247. Similarly, see the concurring opinion of Judge Wright in *Lockheed* concluding that:

> This exclusion affects both male and female employees. While a male employee bears the cost of his spouse's pregnancy, a female employee bears the cost of her daughter's pregnancy. The coverage of risks for the two groups (females with dependents and males with dependents) is equivalent. The value of the coverage and the cost of the pregnancy exclusion may vary

If the Shipyard employees are divided into two groups simply according to which ones have pregnant dependents and which ones do not, both groups would include members of both sexes, since both males and females can have pregnant dependents. If, following the Commission's approach, the spouse is treated separately from other dependents, then the employees may be divided into two groups according to which ones have a pregnant dependent spouse. While it may be assumed that the employees in the one group (i.e., those with a pregnant dependent spouse) are all male, it must be acknowledged that the other group would include the females plus a significant number of males (i.e., males with no spouse; males with a non-pregnant dependent spouse; males with a pregnant spouse who is not a dependent). Thus, it appears even less valid here than it was in *Gilbert* to argue that the alleged discrimination is inextricably sex-linked. Although Congress declared after *Gilbert* that distinctions on the basis of pregnancy are inextricably sex-linked with respect to pregnant employees, it did not go further and declare that distinctions based on whether employees have a pregnant dependent spouse are so inextricably sex-linked as to constitute discrimination against male employees.

The legislative history of the PDA makes frequent references supporting the words of Justice Stevens in his dissent in *Gilbert*:

> The rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the male from the female.

429 U.S. at 161-162. In the PDA, Congress stated clearly that arbitrary distinctions on the basis of pregnancy discriminated against female employees because

---

among individual employees, but this is a necessary incident to group health insurance, as the Court noted in *Manhart*.

680 F.2d at 1247.

it is the capacity to become pregnant which primarily differentiates the male from the female. But Congress did not intend to change the existing principles of Title VII in any other way. Surely Congress never contemplated that its actions would be construed by the Commission as a declaration that it is the capacity to have a pregnant dependent spouse which primarily differentiates the male from the female. The PDA offers no basis for the Commission's interpretive guidelines on dependent's benefits, and the principles of Title VII offer the Commission no basis for its *a fortiori* reasoning here that pregnancy-related distinctions in benefits to dependents are so inextricably sex-linked in their consequences as to constitute sex discrimination against male employees. The district court, therefore, properly concluded that the Commission's interpretation is without statutory support.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully urges this Court to reverse the decision of the Fourth Circuit with instructions to enter a decision consistent with the reasoning of the dissent in the Fourth Circuit and the reasoning of the Ninth Circuit in the *Lockheed* decision.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
LORENCE L. KESSLER
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Amicus Curiae
Equal Employment Advisory Council

January 20, 1983

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

BENJAMIN W. BOLEY
(Counsel of Record)
MICHAEL S. GIANNOTTO
SUZANNE E. MEEKER
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200
Counsel for the Amicus

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE PREGNANCY DISCRIMINATION ACT DOES NOT PROHIBIT THE PAYMENT OF MORE EXTENSIVE BENEFITS FOR SPOUSES' SICKNESSES OR INJURIES THAN FOR THEIR PREGNANCIES	5
II. APPLICATION OF THE TITLE VII PRINCIPLES SET FORTH IN *GILBERT* AND *SATTY* REQUIRES REINSTATEMENT OF THE JUDGMENTS OF THE DISTRICT COURT	12
III. EVEN IF PREGNANCY-RELATED DISTINCTIONS AMONG EMPLOYEES' SPOUSES WERE NOT FACIALLY NEUTRAL, THE DIFFERENTIATION INVOLVED HERE WOULD NOT VIOLATE TITLE VII BECAUSE MALE AND FEMALE EMPLOYEES RECEIVE EQUAL BENEFITS	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Chandler v. *Roudebush*, 425 U.S. 840 (1976) 10
EEOC v. *Emerson Electric Co.*, 539 F.Supp. 153 (E.D. Mo. 1982), appeal docketed, No. 82-1647 (8th Cir. May 27, 1982) 5, 10
EEOC v. *Joslyn Manufacturing & Supply Co.*, 524 F.Supp. 1141 (N.D. Ill. 1981), appeal docketed, No. 82-1634 (7th Cir. Apr. 14, 1982) 5, 8
EEOC v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3485 (U.S. Dec. 15, 1982) (No. 82-1006) 5, 6, 7
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 10
Geduldig v. *Aiello*, 417 U.S. 484 (1974) 12
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) ..... *passim*
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 12
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 12
Nashville Gas Co. v. *Satty*, 434 U.S. 136 (1977) ..... *passim*
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 10

STATUTES AND REGULATIONS:

Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980)
§ 701(k), 42 U.S.C. § 2000e(k) ..... *passim*
§ 703(a), 42 U.S.C. § 2000e-2(a) ..... *passim*
Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Supp. IV 1980)) ..... *passim*
EEOC Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. (1982) 2, 16

LEGISLATIVE MATERIALS:

123 Cong. Rec. 7,539 (1978) 11
123 Cong. Rec. 10,581 (1978) 11

TABLE OF AUTHORITIES—Continued

	Page
123 Cong. Rec. 29,385 (1978)	11
123 Cong. Rec. 29,387 (1978)	11
123 Cong. Rec. 29,388 (1978)	11
123 Cong. Rec. 29,641 (1978)	10
123 Cong. Rec. 29,644 (1978)	10
123 Cong. Rec. 29,661 (1978)	10
123 Cong. Rec. 29,664 (1978)	11
H.R. Rep. No. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 4749	8, 11
S. Rep. No. 331, 95th Cong., 1st Sess. (1977)	8, 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

This brief is filed with the written consent of counsel for both petitioner and respondent. Copies of the letters of consent have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference represents nearly all of the nation's Class I railroads in a wide variety of labor relations matters of concern to the railroad industry generally. A committee established within the Conference, the National Carriers' Conference Committee, normally represents these railroads in national collective bargaining with the unions that represent the railroads' employees. Since the 1950's this collective bargaining has included negotiations to establish and maintain a

program of benefits now known as the Railroad Employees National Health and Welfare Plan. Among other things, the railroads' plan provides hospital, basic medical-surgical, and major medical expense benefits to hundreds of thousands of railroad employees and their dependents. The plan provides more extensive benefits for expenses related to sicknesses and injuries suffered by an employee's spouse and other dependents than it does for their pregnancy-related expenses. In the event the decision of the Court of Appeals is affirmed, the cost to the railroads represented by the Conference of increasing dependents' pregnancy benefits may be substantial.

SUMMARY OF ARGUMENT

The issue presented in this Court is a narrow one: Does petitioner's health plan violate, as a matter of law, section 703(a)(1) or (2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), (2) (1976), because more extensive benefits are paid with respect to expenses for employees' spouses' sicknesses or injuries than for their pregnancies? The Equal Employment Opportunity Commission (the "EEOC") sought to establish in the courts below no more than that petitioner's plan violates Title VII because Questions and Answers Numbers 21 and 22 of the EEOC's Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. (1982), correctly interpret the law.[1] Those Questions and

---

[1] "21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of

Answers declare in effect that petitioner's plan is unlawful on its face. The EEOC did not seek to demonstrate that petitioner's plan was in any way designed to discriminate against male employees or that it had an impermissible discriminatory impact on them.

We show in this brief that the Pregnancy Discrimination Act ("PDA" or "Act"), Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (Supp. IV 1980), applies only to female employees and applicants for employment. It does require that employees' pregnancy benefits be no less extensive than benefits paid for employees' sicknesses or injuries, but it does not apply at all to spouses' benefits, as the express terms of the Act and its legisla-

---

male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

"22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level." 29 C.F.R. § 1604 app. at nos. 21, 22 (1982).

tive history demonstrate. Congress was concerned for the harms suffered by female employees when, among other things, pregnancy coverage is limited. These harms have no relevance to the wives of male employees.

The Title VII principles announced in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), remain unimpaired in the context of spouses' health benefits. Those principles require reinstatement of the judgments of the District Court, since respondent has not attempted to prove that petitioner's plan has a discriminatory impact on male employees or that it is merely a pretext for discrimination against them.

We also show that even if this Court were to reexamine *Gilbert* and *Satty* and conclude that distinctions based on spouses' pregnancies are not facially neutral as a matter of law, the distinction made in petitioner's plan does not result in any employment-related injury to male employees. Male employees do not receive lower compensation than female employees, because petitioner provides no less extensive spouses' benefits to male employees. The plan, in fact, includes a benefit, the pregnancy benefit, which female employees cannot use for their spouses. For this reason, if the plan is more valuable to either group, it is more valuable to male employees.

ARGUMENT

I. THE PREGNANCY DISCRIMINATION ACT DOES NOT PROHIBIT THE PAYMENT OF MORE EXTENSIVE BENEFITS FOR SPOUSES' SICKNESSES OR INJURIES THAN FOR THEIR PREGNANCIES

The decision below turns on the Court of Appeals' construction of the Pregnancy Discrimination Act to apply to medical benefits for male employees' wives as well as to medical benefits for female employees. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 667 F.2d 448, 451 (4th Cir.), approved and adopted, 682 F.2d 113 (4th Cir. 1982) (en banc) (per curiam). That construction is erroneous. The language and legislative history of the PDA show that the Act applies only to women who are themselves employees or applicants for employment. Every other court to construe the Act has so held. See *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3485 (U.S. Dec. 15, 1982) (No. 82-1006); *EEOC* v. *Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo. 1982), appeal docketed, No. 82-1647 (8th Cir. May 27, 1982); *EEOC* v. *Joslyn Manufacturing & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), appeal docketed, No. 82-1634 (7th Cir. Apr. 14, 1982).

Congress enacted the PDA in response to the decisions of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). *Gilbert* and *Satty* held that pregnancy-based distinctions among employees in fringe benefit plans were not sex-based and so were not discriminatory *per se* under section 703(a) of Title VII. The PDA amended the definitional section of Title VII, section 701, to add new subsection (k):

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth,

> or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise."

The Court of Appeals below read this amendment effectively to equate distinctions based upon the pregnancy of an employee's wife with distinctions based upon the sex of the employee himself, thereby making those distinctions *per se* violations of section 703(a). Although the Court did not say so, it apparently considered that if an employee's wife's pregnancy is equated with her sex, her pregnancy is ineluctably equated to the employee's male sex, so that Title VII's general proscription of sex-based discrimination against employees applies.

The Court of Appeals for the Ninth Circuit, in *EEOC* v. *Lockheed Missiles & Space Co.*, held otherwise. It ruled that distinctions based on pregnancy have been declared by the PDA to violate Title VII only when the pregnancy is that of an employee or an applicant for employment. The Court then applied the principles and reasoning of *Gilbert* and *Satty* to conclude that a distinction based on the pregnancy of anyone other than a female employee or applicant for employment "is not a gender based distinction at all." 680 F.2d at 1246 (quoting *General Electric Co.* v. *Gilbert*, 429 U.S. at 136).

The language of the PDA better supports the Ninth Circuit's reading. The first clause of the Act expands the meaning of "sex" to include pregnancy, childbirth, and related medical conditions. If this new definition is interpolated into section 703, the result leads to only one reasonable construction of the scope of the Act:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . pregnancy, childbirth, or related medical conditions . . .; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . pregnancy, childbirth, or related medical conditions . . . ."

As the Ninth Circuit observed, "[t]his can hardly be read to apply to male employees," *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d at 1245, whether or not they have pregnant wives. The Fourth Circuit did not mention section 703.

The second clause of the PDA requires employers to treat equally for employment-related purposes "women affected by pregnancy" and "other persons . . . similar in their ability or inability to work." The Ninth Circuit held that this language referred to female employees and underscored Congress' intention to prohibit only distinctions based on employees' pregnancies. 680 F.2d at 1245. The Fourth Circuit, by contrast, held that because an employer serves "employment-related purposes" by providing dependents' benefits, the "women affected by pregnancy" for whom the second clause requires equal treatment include female spouses as well as female employees. The Court found support for this reading in the statutory comparison of pregnant women to "other persons," rather than "other employees," similar in their capacity for work. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 667 F.2d at 450-51.

The Fourth Circuit's analysis is faulty for three reasons. First, it ignores the fact that section 703 does not

protect spouses, pregnant or not. Second, the House and Senate Reports on the Act repeatedly paraphrase "other persons" as "other employees" and "other workers." See S. Rep. No. 331, 95th Cong., 1st Sess. 4, 7, 14 (1977); H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, 4, 5, 13 (1978). Finally, a female spouse's capacity to work is irrelevant in this context. To suppose that Congress intended to prohibit the payment of pregnancy benefits that are less extensive than other medical benefits for wives able to work but to permit such a differentiation for wives unable to work is hardly reasonable. The only persons whose capacity to work is known or relevant to an employer providing health benefits are its employees.[2]

If the language of the PDA could be thought ambiguous, its legislative history dispels any doubt. Even a relatively brief examination shows that the Ninth Circuit has read the PDA correctly.

The suggestion that the PDA should change existing law with respect to pregnancy-related benefits for employees' spouses was explicitly rejected in the Senate Committee Report:

> "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees; it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore

---

[2] Judge Hall, dissenting from the decision below, also reasoned that "[t]o determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee." 667 F.2d at 452. See also *EEOC* v. *Joslyn Manufacturing & Supply Co.*, 524 F. Supp. at 1142 ("commonsense reading" is reference to female employees).

> the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.
>
> * * * *
>
> "[T]he question of whether an employer who does cover dependents, either with or without additional costs to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 331, *supra*, at 5-6.[3]

The possible application of the PDA to persons other than female employees was also raised during floor debate in the Senate. Senator Hatch asked whether the language of the Act was not overbroad, because "it is arguable that spouses of male employees are covered by this civil rights amendment." Senator Williams, a sponsor of the Act, replied:

> "I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a

---

[3] The Court below acknowledged that the Senate Report states that questions about dependents' pregnancy benefits are not answered by the PDA and should be resolved according to "existing Title VII principles." The court then held that because Title VII includes the PDA, Title VII prohibits more extensive coverage of spouses' illnesses than pregnancies. 667 F.2d at 451. This reasoning is circular. If the PDA itself leaves open the question of Title VII's requirements with respect to spouses' pregnancy benefits, the mere fact that Title VII includes the PDA cannot answer that question. The Title VII principles to which the Senate Report refers must be Title VII principles *other* than the PDA.

> woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; and that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee."

Senator Hatch asked again:

> "So the Senator is satisfied that . . . what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?"

Senator Williams answered, "Exactly." 123 Cong. Rec. 29,644 (1978).[4]

---

[4] That the specific topic of this colloquy was income maintenance rather than medical expense programs does not weaken Senator Williams' affirmation that the Act is "narrowly drawn" for the protection of women workers. The Act does not distinguish in any way between income maintenance and other fringe benefit programs. See *EEOC* v. *Emerson Electric Co.*, 539 F. Supp. at 157 n. 3.

Similarly, the statements of Senators Cranston and Bayh on which respondent relies do not weaken Senator Williams' explanation of the Act. Although both Senators said during Senate debate that they thought equal coverage of pregnancy-related and other medical expenses of employees' dependents would be required, each made clear that he was expressing only his personal opinion. See 123 Cong. Rec. 29,641 (1978) (Statement of Senator Bayh); 123 Cong. Rec. 29,661 (1978) (Statement of Senator Cranston). The individual views of legislators are of dubious authority in the interpretation of a statute under any circumstances. Here, they are further undermined by the contrary statements of a sponsor of the PDA and in the Senate Committee Report. *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of sponsor should be accorded substantial weight); *Chandler* v. *Roudebush*, 425 U.S. 840, 858 n. 36 (1976) (committee statement "more probative of Congressional intent" than remark of individual Senator in floor debate); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (opinions of individual Senators that conflict with statements in committee reports not persuasive).

The legislative history of the Act is replete with evidence that Congress' one, critical object was to protect working women from discrimination on the basis of pregnancy. The House Committee Report emphasizes that the assumption that women will become pregnant and leave the workforce is "at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R. Rep. No. 948, *supra*, at 3; see also *id.* at 6-7 ("Women are still subject to the stereotype that all women are marginal workers.") Similarly, the Senate Report explains that such assumptions are "at the core of the sex stereotype resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 331, *supra*, at 3. Policies based on such assumptions, the Senate Committee found, "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs." *Id.* at 6. Senator Williams told his colleagues that if the law was not changed, "countless women and their families will be forced to suffer unjust and severe economic, social, and psychological consequences." 123 Cong. Rec. 7,539 (1978). Congress was particularly concerned to redress two disadvantages suffered by pregnant employees: loss of pay during their period of pregnancy-related disability and loss of opportunity throughout their childbearing years.[5] Neither has any relevance to wives of male employees.

In short, the language and legislative history of the PDA show that the Act does not affect the rights of male employees with respect to spouses' benefits. If Congress had intended the PDA to mean that any distinction based on the pregnancy of an employee's wife is on its face discrimi-

---

[5] In addition to the House and Senate Committee Reports cited in the text, see 123 Cong. Rec. 29,385 (1978) (Statement of Senator Williams); 123 Cong. Rec. 29,387 (1978) (Statement of Senator Javits); 123 Cong. Rec. 29,388 (1978) (Statement of Senator Kennedy); 123 Cong. Rec. 29,664 (1978) (Statement of Senator Brooke); 123 Cong. Rec. 10,581 (1978) (Statement of Congressman Hawkins).

natory against her husband, then the assertion in the Senate Report that that issue remains open would make no sense at all. Even as amended by the PDA, Title VII provides the same protections in the context of spouses' benefits that it did when this Court decided *Gilbert* and *Satty*. The principles set forth in those cases are the "existing" Title VII principles to which the Senate Report refers. They control the disposition of this case.

II. APPLICATION OF THE TITLE VII PRINCIPLES SET FORTH IN *GILBERT* AND *SATTY* REQUIRES REINSTATEMENT OF THE JUDGMENTS OF THE DISTRICT COURT

This Court's decisions in *Gilbert* and *Satty* establish the following principles:

1. A distinction based on pregnancy is "on its face, . . . neutral in its treatment of male and female employees," *Nashville Gas Co.* v. *Satty*, 434 U.S. at 140; see also *id.* at 143 (referring to "petitioner's facially neutral seniority system"), and not a distinction based on sex. The PDA now compels a contrary conclusion if the distinction is based on the pregnancy of female employees. The PDA does not, however, disturb the principle that pregnancy-based classifications of other persons are facially neutral. *Cf. Geduldig* v. *Aiello*, 417 U.S. 484, 496 n. 20 (1974) (pregnancy-based distinctions facially neutral as matter of constitutional law).

2. Under the doctrine announced by this Court in *Griggs* v. *Duke Power Co*, 401 U.S. 424, 431 (1971), a complaining employee may establish a violation of section 703(a)(2) and, possibly, of section 703(a)(1)[6] by showing that the

---

[6] This Court has queried, but not decided, whether proof of disparate impact ever is sufficient to establish that a fringe benefit package violates § 703(a)(1). See *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 710 n. 20 (1978); *Nashville Gas Co.* v. *Satty*, 434 U.S. at 144-45; *id.* at 157 n. 9 (Stevens, J., concurring).

facially neutral policy has a significantly more severe impact on employees of one sex than on employees of the other sex. Under *Gilbert*, the proper test of the impact of a compensation arrangement is whether the pregnancy-based distinction results in the arrangement being worth more to employees of one sex. Neither in *Gilbert* nor in *Satty* were the plaintiffs able to show such unequal value with respect to their employers' sick pay plans, because male and female employees were afforded the same "aggregate risk protection."[7] See *Nashville Gas Co.* v. *Satty*, 434 U.S. at 144; *General Electric Co.* v. *Gilbert*, 429 U.S. at 138. By contrast, the seniority system before the Court in *Satty* was found to have a disparate impact on women because it deprived women who were forced to take pregnancy leaves of their accrued seniority, while no comparable deprivation was suffered by men who returned to work after disability leaves.

3. A complaining employee also may establish that the employer's policy violates Title VII if it is proven to be a "mere pretext[] designed to effect an invidious discrimination" on the basis of sex, *General Electric Co.* v. *Gilbert*, 429 U.S. at 134-35.

4. If the complaining employee does not attempt to establish that the challenged policy has a disparate impact, or to show that it is a pretext for sex-based discrimination, the action must be dismissed. See *Nashville Gas Co.* v. *Satty*, 434 U.S. at 145-46 & n. 6.[8]

---

[7] In *Gilbert* this Court noted that, on the basis of experience under the challenged income maintenance plan, the dollar value of the plan actually was greater for female than for male employees, 429 U.S. at 130 n. 9, but did not rely on this evidence as proof of value.

[8] In *Satty*, the case was remanded for a determination whether the plaintiff had preserved her right to proceed on a pretext theory, because neither of the courts below had made findings on that issue. Justice Powell, joined by Justices Brennan and Marshall, thought that the plaintiff also should be afforded an opportunity on remand to show disparate impact, but *only* because *Satty* was tried and

Because these principles remain valid except to the extent that they have been overturned by the PDA, and because the PDA is inapplicable to the facts of this case, this Court should reverse the decision below and reinstate the amended judgment of the District Court in Civil Action No. 80-0020-NN and the order of that Court in Civil Action No. 80-0237-NN. The only issue in both actions is whether petitioner's plan is unlawful *per se*, *i.e.*, discriminatory on its face. Respondent did not contend in the courts below that petitioner's plan has a discriminatory impact or an invidious design. Accordingly, a remand for further proceedings would be inappropriate.

III. EVEN IF PREGNANCY-RELATED DISTINCTIONS AMONG EMPLOYEES' SPOUSES WERE NOT FACIALLY NEUTRAL, THE DIFFERENTIATION INVOLVED HERE WOULD NOT VIOLATE TITLE VII BECAUSE MALE AND FEMALE EMPLOYEES RECEIVE EQUAL BENEFITS

This Court may decide that, in response to the PDA, it should reexamine the application to employees' spouses of the conclusion in *Gilbert* and *Satty* that pregnancy-based distinctions are facially neutral as a matter of law. A conclusion that the distinction made by petitioner's plan is not facially neutral, however, would not establish that the plan violates Title VII. Unlike a distinction based on a spouse's sex as such, pregnancy-related distinctions among spouses do not necessarily result in unequal treatment of male and female employees, as is proven by this case itself.

Gilbert establishes that male and female employees are treated equally with respect to fringe benefits if the benefits are not worth more to employees of one sex. The proper test of worth, this Court said, is the "aggregate risk pro-

---

reviewed in the court of appeals before this Court's decision in *Gilbert*. 434 U.S. at 147 (Powell, J., concurring). But see *id.* at 157 n. 9 (Stevens, J., concurring) (agreeing with majority that remand on disparate impact issue inappropriate).

tection" afforded male and female employees. 429 U.S. at 138. Even if the Court of Appeals below were correct in concluding that because of the PDA Title VII now generally equates pregnancy with sex, the PDA would not disturb this second, distinct part of *Gilbert* setting forth a general standard not tied to the facts in that case.

Under petitioner's plan, female employees do not receive benefits for their spouses' medical expenses that are "worth more" than those that male employees receive. Each employee, whether male or female, receives the same level of coverage of all risks to which both husbands and wives are subject. Each male employee also receives somewhat less extensive coverage of his wife's pregnancy-related expenses. This coverage of some pregnancy-related expenses is an additional benefit available only to male employees. In no sense, then, is petitioner's plan more valuable to female than to male employees. Indeed, because of the benefit for spouses' pregnancies, it is more valuable to male employees.

Respondent may advance two reasons why petitioner's plan might be thought to compensate male and female employees unequally. Both are unsound when carefully examined. One argument is that the family coverage—the total coverage for an employee and his or her spouse—provided to female employees is more generous than that given to male employees. That is, a female employee receives more extensive coverage of the family's pregnancy-related expenses when she is pregnant than does the male employee when his wife is pregnant. Therefore, the argument must run, the male employee is disfavored.

This argument is meritless for two reasons. First, the inequality it purports to show is not in the benefits for employees' spouses but in the benefits for employees themselves. Had petitioner adopted, initially, a plan that covered one hundred percent of all of the medical expenses of employees only, including as required by the PDA the same one

hundred percent coverage for expenses related to pregnancy, that plan would unquestionably be in compliance with section 703. The addition of dependents' coverage that provides greater benefits for the wives of male employees than for the husbands of female employees, by covering every expense of a wife that is covered for a husband and covering a substantial part of a wife's pregnancy-related expenses, would not make the combined plan discriminatory in favor of female employees. In short, the asserted higher compensation to female employees, if it exists here, results from the mandate and application of the PDA and not from any discriminatory action of the petitioner. Thus, this argument is merely an attempt to establish indirectly that the PDA itself applies to spouses' benefits, a proposition that the text and legislative history of the Act refute.

Second, as even respondent concedes, neither Title VII nor the PDA requires that spouses' and employees' pregnancy benefits be equal. See Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. at no. 22 (1982). It follows that any "inequality" in family coverage that rests entirely on a permissible difference between spouses' and employees' pregnancy benefits cannot violate Title VII.

The other argument that respondent may put forward focuses exclusively on spouses' benefits: female employees receive "full" coverage of all of their husbands' anticipated medical expenses, while male employees receive less than "full" coverage of one of their wives' anticipated medical expenses, *i.e.*, pregnancy-related expenses. This argument might be sound if there were some risk to all spouses that was not covered for male employees, but there is no such risk. Instead, every element of the "full" coverage given to female employees is given to male employees as well. Indeed, as noted above, male employees as a practical matter receive greater spouses' coverage.

In this respect, petitioner's plan is no different than a plan that provides no spouses' benefits other than limited benefits for wives' pregnancies. Such a plan does not disfavor male employees. They alone can use the only benefits provided. Instead of providing no spouses' benefits, petitioner's plan provides equal non-pregnancy benefits for all spouses. Adding equal non-pregnancy benefits for the spouses of male and female employees cannot logically convert a plan that favors male employees into one that discriminates against them.

Put differently, respondent cannot show discrimination because individual male and female employees are not similarly situated with respect to the risk of spouses' pregnancies. There simply is no risk to female employees' husbands which is comparable to the risk of pregnancy to male employees' wives.[9] Title VII does not require that differently situated employees be treated the same.

In sum, petitioner's plan does not result in unequal compensation to male and female employees. Consequently, the plan would not violate Title VII even if this Court decides that pregnancy-based distinctions among spouses are not facially neutral.

---

[9] The risk of sex-specific urogenital diseases and dysfunctions is not comparable, since risks of this general type are associated with each sex, and petitioner's plan covers them equally for spouses of both sexes.

CONCLUSION

For the reasons set forth, this Court should reverse the decision of the Court of Appeals and reinstate the judgments of the District Court.

Respectfully submitted,

BENJAMIN W. BOLEY
(Counsel of Record)
MICHAEL S. GIANNOTTO
SUZANNE E. MEEKER
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Counsel for the Amicus

January 20, 1983

[THIS PAGE INTENTIONALLY LEFT BLANK]

Office-Supreme Court, U.S.
FILED
FEB 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-411

IN THE

Supreme Court of the United States

October Term, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

LAW OFFICES OF
LAWRENCE B. TRYGSTAD,
By RICHARD J. SCHWAB,
1880 Century Park East,
Suite 517,
Los Angeles, Calif. 90067,
(213) 552-0500,
Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

	Page
Request for Permission to File Brief Amicus Curiae in Support of Respondents	1
Interest of Amicus Curiae	2
Brief Amicus Curiae in Support of Respondents	5
Interest of Amicus Curiae	5
Summary of Argument	6
Argument	7
Traditional Principles of Title VII Mandate That the Pregnancy Discrimination Act Be Interpreted to Equally Afford Protection to All Employees From the Risk of Pregnancy Related Disabilities	7
Conclusion	9
Appendix A. Findings of Fact and Conclusion of Law	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Equal Employment Opportunities Commission v. Lockheed Missiles and Space Company, Inc. (9th Cir. 1982) 680 F.2d 1243	8
Frontiero v. Richardson, 411 U.S. 677 (1973)	8
Geduldig v. Aiello, 417 U.S. 484 (1974)	7
General Electric Company v. Gilbert, 429 U.S. 125 (1976)	7, 8
McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976)	9
Reed v. Reed, 404 U.S. 71 (1971)	8
United States Steel Workers' of America, AFL-CIO-CLC v. Weber, et al., 443 U.S. 191 (1979)	8
Rule	
Rules of the Supreme Court of the United States, Rule 36.2	1
Statutes	
California Government Code, Sec. 3540 et seq.	1
United States Code, Title 42, Sec. 2000(k)	2

No. 82-411

IN THE

Supreme Court of the United States

October Term, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

REQUEST FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the United Teachers-Los Angeles, an unincorporated association, moves this Court for permission to file a Brief Amicus Curiae in the above entitled case in support of the Respondents. This motion is accompanied by the written consent of all parties to this case.

The United Teachers-Los Angeles, an unincorporated association, is the exclusive bargaining organization under the provisions of California Government Code Section 3540 *et seq.*, for all certificated (teaching) non-management employees, in the Los Angeles Unified School District. It represents approximately 30,000 certificated employees, 17,000 being members of the Collective Bargaining Organization.

The United Teachers-Los Angeles being familiar with the issues involved and the scope of their presentation, believes that there is a necessity for additional argument on the questions presented herein.

Interest of Amicus Curiae.

The United Teachers-Los Angeles, is involved in a legal action against the Los Angeles Unified School District which raises similar issues as in this instant case.

In *United Teachers-Los Angeles v. Board of Education of the City of Los Angeles, and the Los Angeles Unified School District, et al.*, Case No. 81-2121 LEW (GX), the United States District Court ruled that the Pregnancy Discrimination Act, 42 U.S.C. 2000(k) required an employer to include coverage of pregnancy related medical costs of spouses of employees, so long as the spouses were provided medical care coverage for non-pregnancy related conditions, and such coverage is at a level equivalent to the amount of coverage for non-pregnancy related conditions. (A copy of the United States District Court's Findings of Fact and Conclusions of Law are appended hereto as Appendix "A".

The Los Angeles Unified School District has appealed this decision favorable to the United Teachers-Los Angeles, to the United States Circuit Court of Appeals for the Ninth Circuit. Currently the Ninth Circuit Court of Appeals, after oral argument, has deferred submission of *United Teachers-Los Angeles v. Board of Education of the City of Los Angeles, et al.*, Case No. 82-5360, pending decision of this case.

Amicus Curiae believes that the Petitioner in the instant case is attempting to have the Pregnancy Discrimination Act interpreted so as to permit disparate employment benefits between women employees and men employees based solely upon their gender.

The United Teachers-Los Angeles, respectfully requests that this court grant it permission to file the attached Brief Amicus Curiae, copies of which have been served upon all parties to the case.

Dated: February 18, 1983.

Respectfully submitted,
LAW OFFICES OF
LAWRENCE B. TRYGSTAD,
By RICHARD J. SCHWAB,
Attorneys for United
Teachers-Los Angeles.

No. 82-411

IN THE

Supreme Court of the United States

October Term, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

Interest of Amicus Curiae.

The United Teachers-Los Angeles (UTLA) has a particular and special interest in the above entitled litigation, in that it is involved in a similar legal action and is the exclusive representative organization for approximately 30,000 certificated (teaching) non-management employees in the Los Angeles Unified School District. The United Teachers-Los Angeles is greatly concerned that unless the Pregnancy Discrimination Act is construed to equally protect all employees regardless of sex, it will result in an inequity in the working place. Specifically, male employees, because of their gender, would receive a lesser compensation package because a male employee and his family would have to pay for pregnancy related costs while his female counterpart would have those expenses paid by insurance. Such, unequal treatment, it is urged violates traditional Title VII principles.

Summary of Argument.

Prior decisions of this court reflect that traditional Title VII principles would be violated if the Pregnancy Discrimination Act were interpreted to deny the same benefits to male employees as given to female employees.

An employer's health plan must provide an equal package of benefits to both male and female employees.

Congress, by promulgating the Pregnancy Discrimination Act, certainly has not intended to create a risk from which men and their spouses are not protected, while women and their spouses are covered.

To construe the Pregnancy Discrimination Act to protect only female employees would represent a distinct retreat from prior decisions prohibiting gender preferences.

In conclusion, once Congress had enacted the Pregnancy Discrimination Act recognizing pregnancy to be more than just a physical condition which could be excluded from insurance coverage, such protection must be granted equally.

ARGUMENT.

Traditional Principles of Title VII Mandate That the Pregnancy Discrimination Act Be Interpreted to Equally Afford Protection to All Employees From the Risk of Pregnancy Related Disabilities.

Traditional Title VII principles under this Court's decisions of *General Electric Company v. Gilbert*, 429 U.S. 125 (1976) which adopted the reasoning in *Geduldig v. Aiello*, 417 U.S. 484 (1974) would be violated if the Pregnancy Discrimination Act were interpreted not to include the same benefits to male employees. In both *Gilbert, supra,* and *Geduldig, supra,* this court held that failure to cover pregnancy benefits in a health insurance plan was not in violation of Title VII or Constitutional principles because neither male or female employees were covered.

However, it appears uncontroverted that the Pregnancy Discrimination Act was a response by the Congress to the *Gilbert* decision. Thereafter this amendment became an integral part of Title VII, because it mandated insurance coverage for "pregnancy, child birth, or related conditions" as an acknowledged risk protected under Title VII.

In determining the issue of whether or not the Pregnancy Discrimination Act should be extended to male employees and their spouses and female employees and their spouses equally, it must be evaluated under the traditional Title VII standards, namely,

> "Is there a risk from which men are protected and women are not, likewise is there a risk from which women are protected and men are not?" (See *General Electric Company v. Gilbert, supra,* at 135.

In other words, does an employer's health plan provide an equal package of benefits to both male employees and female employees? The Ninth Circuit in *Equal Employment*

Opportunities Commission v. Lockheed Missiles and Space Company, Inc. (9th Cir. 1982) 680 F.2d 1243, by a strained analysis of the Pregnancy Discrimination Act, found that Congress, by enacting this subsection purported to do no more than provide pregnancy protection only to women employees.

If this interpretation is correct, then there is the anomalous result which this Court specifically held in *Gilbert*, to be contrary to traditional Title VII principles. Specifically, Congress, by promulgating the Pregnancy Discrimination Act, would create a risk from which men and their spouses are not protected and from which women and their spouses are protected. The consequence is obvious. Under *Lockheed*, there is an uneven insurance package, which male employees, strictly because of their sex are excluded. Certainly, Congress would not have enacted legislation which supports such an interpretation.

What further makes the *Lockheed*, decision, suspect is that it does not directly deal with traditional Title VII concepts which are solidly ensconced within our judicial framework. Namely, the thrust of Title VII is the protections of the victims of traditional societal discrimination. Title VII protects *all* workers (See *United States Steel Workers of America, AFL-CIO-CLC v. Weber, et al.*, 443 U.S. 191 [1979]), and it would be incongruous with Title VII to construe the Pregnancy Discrimination Act to have the limited effect of protecting solely women employees. This would represent a distinct retreat from prior United States Supreme Court decisions prohibiting gender related preferences. (See (*Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

Thus, while it would seem that one of the motivating factors behind enactment of the Pregnancy Discrimination Act was to protect women employees, this merely empha-

sizes the nature of the right being protected, and not a stated limitation. (See *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273 [1976]).

In conclusion, once Congress promulgated the Pregnancy Discrimination Act, recognizing pregnancy to be more than just a physical condition which could be excluded from insurance coverage, such protection, must be granted to both male and female employees alike without distinction.

Conclusion.

The concept of equal justice, although often obfuscated by a myriad of statutes and regulation, is in reality a very simple one. Title VII embodies that simplicity.

Thus, there is no reason or rational basis in this instant case upon which to allow a health insurance plan to contain a distinction based upon pregnancy that results in a less complete coverage for male employees with spouses, than their female counterparts.

Such a distinction creates not only an inequity, but also unfairness in the employment environment based purely and arbitrarily on the gender of the employee.

It is therefore respectfully urged that this Court not allow this unequal and potential acrimonious state of affairs to continue to exist. For the foregoing reasons the Circuit Court decision below should be affirmed in all respects.

Dated: February 18, 1983.

Respectfully submitted,

LAW OFFICES OF
LAWRENCE B. TRYGSTAD,
By RICHARD J. SCHWAB,
Attorneys for Amicus Curiae.

APPENDIX A.

Findings of Fact and Conclusion of Law.

United States District Court, Central District of California.

United Teachers-Los Angeles, Plaintiff, v. Board of Education of the City of Los Angeles and the Los Angeles Unified School District, Defendants. CV 81-2121 LEW (Gx).

Filed: March 3, 1982.

The cause came on for trial on December 14, 1981. Stipulation of Facts and exhibits for trial were received on November 25, 1981. Briefs were submitted on December 4, 1981 and reply briefs submitted December 9, 1981. The parties made their arguments on December 14, 1981. Law Offices of Lawrence B. Trygstad by Richard J. Schwab appeared for plaintiffs and John H. Larson, County Counsel by Steven J. Carnevale and Nina W. Phillips, Deputy County Counsels appeared for the Defendants.

The Court having considered the stipulated facts, exhibits, and briefs, and having heard the argument of counsel, enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff, UNITED TEACHERS-LOS ANGELES (UTLA), is an employee organization organized and existing pursuant to the laws of the State of California, and is the exclusive representative of nearly all certificated (teaching) non-Management employees of the defendant LOS ANGELES UNIFIED SCHOOL DISTRICT (DISTRICT).

2. Defendant DISTRICT is and at all times relevant hereto was a legally constituted school district established under the laws of the State of California, and located in the

County of Los Angeles, California. Defendant, BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, was and is the duly elected or appointed, and qualified governing board of the DISTRICT, operating pursuant to the laws of the State of California.

3. On or about May 2, 1980, Plaintiff, UTLA, filed a charge with the Equal Employment Opportunity Commission and the California Fair Employment Practices Commission concurrently, on behalf of all male members of UTLA alleging employment discrimination as alleged in the complaint herein on the part of Defendants herein. On or about May 9, 1980, Defendants were served with a Notice of Employment Discrimination by the Equal Employment Opportunity Commission to which they responded on December 5, 1980. Said charge was not acted upon by the Fair Employment Practices Commission and was referred to the Equal Employment Opportunity Commission on or about January 5, 1981. On or about March 9, 1981, the Equal Employment Opportunity Commission issued to Plaintiff Notification of Right to Sue. On or about April 23, 1981, Plaintiff instituted this lawsuit. It has exhausted all administrative remedies and this Court has jurisdiction pursuant to 42 USC 2000(e) et seq.

4. Under a collective bargaining agreement and under State and Federal law, the DISTRICT provides its certificated employees with certain health and medical insurance benefits. A choice of five different health plans is offered to employees and employees are free to choose from among these five plans. The DISTRICT submits a single composite premium to the various carriers regardless of the number of dependants per employee enrolled in the plan.

5. From on or about April 30, 1979, until the present, the five health plans have provided employees and their dependents a choice of the following health coverage:

(a) *Kaiser Foundation Health Plan, Inc.*
There is no charge to the employee or enrolled dependents for most medical procedures performed by Kaiser personnel in Kaiser facilities. With respect to pregnancy benefits, Kaiser charges one hundred and fifty dollars for members enrolled ten months or more and three hundred and fifty dollars for members enrolled less than ten months. The DISTRICT reimburses this amount to female employees only. All other disabilities are covered for employees and their dependents.

(b) *Ross-Loos Medical Group, Inc.*
There is generally no charge to the employee of enrolled dependents for care by Ross-Loos physicians at Ross-Loos approved facilities. There is no charge to employees for pregnancy care. For dependents there is a hundred dollar charge for pregnancy care. The subscriber is responsible for all hospital costs in excess of three hundred dollars resulting from dependent's pregnancy. Hospital costs for pregnancy complications are fully covered for employees and all enrolled dependents. All other disabilities are covered for employees and their dependents including spouses.

(c) Maxicare Health Plan.
There is no charge to the employee or enrolled dependents for most medical procedures. Maxicare charges a one hundred and fifty dollar flat fee for employees and dependents for pregnancy. The DISTRICT reimburses this amount to female employees. All other disabilities are covered for employees and their dependents including spouses.

(d) *Blue Cross of Southern California.*
The carrier has established a schedule of payments it will make for the various categories of medical treatment received by employees and their enrolled

dependents. Eighty percent of the expenses incurred in excess of these prescribed amounts are also paid by the carrier after the employee or dependents has paid the first one hundred dollars.

Pregnancy benefits are provided for all employees under the basic plan. For dependents, a one hundred dollar hospital fee is payable for normal delivery if the member has been covered by this plan since the inception of pregnancy and eighty percent of eligible hospital and professional expenses in excess of seven hundred and fifty dollars.

(e) *Blue Shield of California.*

The carrier has established a schedule of payments it will make for various types of medical treatment. The carrier has a list of member physicians who accept this amount as payment in full for services rendered. Eighty percent of the expenses incurred which are not covered by the basic schedule of payments are paid after the employee or dependent pays the first one hundred dollars. This same coverage applies to pregnancy related medical expenses of employees. It does not apply to pregnancy related medical treatment for dependents. For dependents, a one hundred dollar hospital fee is payable for normal delivery if the member has been covered by this plan since inception of the pregnancy and eighty percent of eligible hospital and professional expenses in excess of seven hundred and fifty dollars are paid.

6. That on April 30, 1979, the Board of Education adopted a proposal to amend the existing health care contract to provide coverage for maternity care for female employees and their spouses, but not for male employees and their spouses. As a result, only the male employee's family income must pay for pregnancy-related medical expenses

while under the same circumstances a female employee's family would not.

7. That following April 30, 1979 Board resolution the existing health contracts have never been amended to provide maternity coverage for male employees.

8. Defendants, although requested, have refused and unless permanently enjoined by this Court will continue to refuse to provide pregnancy and maternity benefits for the spouses of male employees.

9. Each and every Conclusion of Law herein after contained which may properly be a Finding of Fact is incorporated by reference as though fully set forth at this point.

Conclusions of Law

1. Plaintiff as the exclusive bargaining employee organization for nearly all certificated (teaching) non-management employees of the Defendant DISTRICT has standing to maintain the claims for injunctive relief under Section 701 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e) *et seq.* on behalf of its male members. *Social Services Union v. City of Santa Clara,* 609 F.2d 944 (9th Cir. 1979).

2. Plaintiff, by virtue of signing the collective bargaining agreement which excludes spouses of male employees from pregnancy-related insurance benefits, was not estopped nor deemed to have waived its right to assert a violation of Section 701 of Title VII on behalf of its male members. *Cf. Social Services Union, Supra.* (Union, although contract signatory, is adequate class representative of its members in employment discrimination suit challenging employment practices.)

3. Plaintiff does not have standing in its capacity as the exclusive bargaining organization in the DISTRICT to receive back damages on behalf of its male members. *Local*

194, Wholesale and Department Store Union v. Standard Brands, 540 F.2d 864 (7th Cir. 1976).

4. On October 28, 1978, Congress passed an amendment, subsection k, to Title VII, 42 U.S.C. §2000 (e). The Pregnancy Amendment, 42 U.S.C. 2000(e)k, [hereinafter PDA] states:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and the women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected, but similar in their ability or inability to work, and nothing in Section 703(h) shall be interpreted to permit otherwise.

5. The legislative history to the PDA does not concludemonstrate the intent of Congress with respect to the issue of employee benefits. In particular, the legislative history does not state whether or not Congress intended it to be illegal sex discrimination if a health plan for dependents of employees covers pregnancy related medical expenses less than other medical expenses. S.Rep No. 331, 95th Cong.2d Sess. 5-6 (1977) [hereinafter Senate Report]; 123 *Cong. Rec.* 29642 (1977) (Comments of Senator Bayh); 123 *Cong. Rec.* 29644 (1977) (Comments of Senators Hatch and Williams); 123 *Cong. Rec.* 29663 (1977) (Comments of Senator Cranston).

6. The Senate Report accompanying the Senate version of PDA states:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context, it must be

remembered that the basic purpose of the bill is to protect women employees; it does not alter the basic principles of title VII as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore, the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.

. . .

. . . [T]he question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the exte. of coverage for their dependents.

Senate Report, *Supra*, at 5-6.

7. The PDA was a Congressional response to the United States Supreme Court decision in *General Electric v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court ruled that the exclusion of pregnancy related benefits from an employer's comprehensive disability plan did not violate Title VII. The legislative history to the PDA demonstrates that the Supreme Court in *General Electric* incorrectly interpreted Title VII; Congress intended to prohibit pregnancy related discrimination as sex discrimination under Title VII. Senate Report, *Supra*, at 2-4; H. Rep. 948, 95th Cong., 2d.Sess. 1-4 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4750-52.

8. It would be unsupported by the legislative history behind, or the policy embodied in, the PDA and Title VII for this Court to rule that the PDA was intended to reverse *General Electric* only as to the pregnancy related expenses of working women themselves. As the Senate Report notes, the thrust of the PDA's changes to Title VII is to protect working women who become pregnant. Senate Report, *Supra*, at 5 ("[I]t must be remembered that the basic purpose of the bill is to protect women employees. . . ."). Similarly, the thrust of Title VII is the protection of the victims of traditional societal discrimination. Title VII protects *all* workers, however, *See, e.g., United Steelworkers of America, AFL-CIO-CLC v. Weber, et al.*, 443 U.S. 191 (1979), and it would be inconsistent with Title VII to construe the PDA to have the limited effect of protecting solely women employees. *Newport News Shipbuilding v. E.E.O.C.*, Nos. 81-1283 and 1307, (4th Cir., Jan. 7, 1982), *reported in* 27 F.E.P. Cases 1219 (BNA). *Contra E.E.O.C. v. Joslyn Manufacturing*, 524 F. Supp. 1141 (N.D. Ill. 1981).

9. It would be incorrect for this Court to conclude that the majority opinion in *General Electric* controls the present suit. The PDA was the Congressional rejection of the *General Electric* decision; the dissenting opinions in *General Electric* better explain the meaning of Title VII. To resolve the present controversy "on the basis of existing Title VII principles," Senate Report, *Supra*, at 5, therefore, this Court will look to the dissenting opinions in *General Electric*.

10. Contemporaneously or soon after Congress amended Title VII, to include the Pregnancy Discrimination Act, the Equal Employment Opportunities Commission [hereinafter E.E.O.C.], relying upon the Congressional Record and comments from the public and affected Federal Agencies, issued final interpretative guidelines in the form of questions

and answers establishing and clarifying the intent of Congress on the issue of employee benefits. The interpretative guidelines, found at 29 C.F.R. Section 1604.10 (1981), questions and answers 21 and 22 state as follows:

> 21.-Q. Must an employer provide health insurance for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependants of all employees?
>
> A. Where an employer provides no coverage for dependants, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the expenses of spouse, of male employees, including those arising from pregnancy-related conditions. But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependants as long as it excludes the pregnancy-related conditions of such non-spouse dependants of male and female employees equally.
>
> 22.-Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical expenses of the spouses of male employees as it provides for its female employees?
>
> A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides for the medical conditions of the spouses of its employees, the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100% of reasonable and customary expenses sustained for a medical condition, but only covers dependant spouses

for 50% of reasonable and customary coverage expenses for the medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50% level.

11. The E.E.O.C. guidelines above referenced are entitled to great deference in that it is the Administrative Agency responsible for interpreting and implementing Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

12. The language of the PDA indicates that any distinction in employee spousal benefits based on pregnancy constitutes illegal sex discrimination. *Newport News Shipbuilding, Supra.*

13. Title VII embodies a strong national policy against discrimination in employment on the basis of sex. This Court concludes that distinctions among employees which are based upon pregnancy related criteria undercut that strong national policy. As the Senate Report, *Supra*, at 3, states, a contrary decision, such as that reached by the majority in *General Electric* would "threaten to undermine the central purposes of the sex discrimination prohibitions of title VII."

14. Defendants have not established nor asserted that the disparate insurance coverage for pregnancy-related benefits between male and female employees in the DISTRICT is either a Bona Fide Occupational Qualification or a business necessity.

15. Under Article VII, Section 1.0 of the 1980-1982 Collective Bargaining Agreement by and between Plaintiff and Defendants, the Defendants are expressly prohibited from discriminating against any employee pursuant to applicable Federal and State laws because of sex.

16. For the foregoing reasons, this Court holds that under the facts of this case, the insurance programs currently

provided by the defendants violate Title VII and the E.E.O.C. guidelines promulgated thereunder because they discriminate against male employees as illustrated in the E.E.O.C. guidelines.

17. Plaintiff, except as stated in Conclusion of Law 3, is entitled to the relief prayed for in its complaint including, but not limited to, the costs and disbursements of this action and reasonable attorneys' fees pursuant to 42 U.S.C. § 2000 (e)5(k). *Burns v. Southern Pacific*, 589 F.2d 403, 408 (9th Cir. 1978).

18. Each and every finding of fact which properly may be deemed a conclusion of law is herein incorporated by reference as though fully set forth.

19. That Judgement is rendered in favor of Plaintiff and each of them.

Dated: Mar. 2, 1982.

/s/ Laughlin E. Waters,
Laughlin E. Waters
United States District Judge

No. 82-411-CFX
Status: GRANTED

Title: Newport News Shipbuilding and Dry Dock Company, Petitioner
v.
Equal Employment Opportunity Commission

Docketed:
September 10, 1982

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Kramer, Andrew M.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 10 1982	G	Petition for writ of certiorari filed.
3	Oct 8 1982		Order extending time to file response to petition until November 13, 1982.
4	Oct 13 1982		Brief amicus curiae of Chamber of Commerce of U.S. filed.
5	Nov 17 1982		DISTRIBUTED. December 3, 1982
6	Nov 19 1982	X	Brief of respondent E.E.O.C. in support of petition filed.
7	Nov 19 1982		Lodging received.
8	Dec 6 1982		Petition GRANTED.
			**********
9	Jan 19 1983		Brief amicus curiae of Chamber of Commerce of U.S. filed.
10	Jan 20 1983		Brief amicus curiae of Emerson Electric Co. filed.
11	Jan 20 1983		Brief amicus curiae of National Railway Labor filed.
12	Jan 21 1983		Joint appendix filed.
13	Jan 21 1983		Brief of petitioner Newport News Shipbldg. filed.
14	Jan 20 1983		Brief amicus curiae of Equal Employment Advisory Council filed.
16	Feb 18 1983		Order extending time to file brief of respondent on the merits until March 2, 1983.
17	Feb 19 1983		Brief amicus curiae of United Teachers-Los Angeles filed.
18	Mar 1 1983		Brief amicus curiae of Amer. Assn. of University Women, et al. filed.
19	Mar 2 1983		Brief of respondent EEOC filed.
20	Mar 2 1983		Brief amicus curiae of AFL-CIO, et al. filed.
21	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 27, 1983. (2nd case) 1 hour
22	Mar 24 1983		CIRCULATED.
23	Apr 14 1983		Record filed.
24	Apr 14 1983		Certified original record & C.A. proceedings, 3 volumes, received.
25	Apr 19 1983	X	Reply brief of petitioner Newport News Shipbldg. filed.
26	Apr 27 1983		ARGUED.